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Supreme Court of the United States

OCTOBER TERM, 1948

No. 38

LA CROSSE TELEPHONE CORPORATION,
APPELLANT,

vs.

WISCONSIN EMPLOYMENT RELATIONS BOARD, L. E. GOODING, HENRY RULE AND J. E. FITZGIBBON, AS MEMBERS OF THE WISCONSIN EMPLOYMENT RELATIONS BOARD

No. 39

INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, LOCAL B-953, A. F. OF L., APPELLANT,

vs.

WISCONSIN EMPLOYMENT RELATIONS BOARD, L. E. GOODING, HENRY RULE AND J. E. FITZGIBBON, AS MEMBERS OF THE WISCONSIN EMPLOYMENT RELATIONS BOARD

APPEALS FROM THE SUPREME COURT OF THE STATE OF WISCONSIN

FILED MARCH 29, 1948.

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APPEALS FROM THE SUPREME COURT OF THE STATE OF WISCONSIN

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IN SUPREME COURT OF WISCONSIN

No. 60

La Crosse Telephone Corporation, Petitioner and Respondent,

vs.

Wisconsin Employment Relations Board, L. E. Gooding, Henry Rule, and J. E. Fitzgibbon, Defendants and Appellants

Appellant's Appendix

[fol. 5] In Circuit Court of La Crosse County

Memorandum Decision (Omitting formal parts)

After a thorough consideration of the arguments presented upon the appeals in the above entitled matter from the Wisconsin Employment Relations Board, and a study of the extensive briefs submitted, I have come to the conclusion that the very recent decision by the Supreme Court of the United States in Bethlehem Steel Company et al., vs. New York State Labor Relations Board, and The Allegheny Ludlum Steel Corp. vs. Wm. J. Kelley et al., is so conclusive of the legal problems here involved as to relieve this court of the necessity of determining the questions raised on these appeals. In other words, it is my opinion that this decision of the United States Supreme Court leaves no constitutional authority in the Wisconsin Employment Relations Board to determine collective bargaining units and to conduct collective bargaining elections among employees or employers engaged in interstate commerce, and of course it is admitted that the La Crosse Telephone Corporation is so engaged in interstate commerce.

It is not necessary that I set forth at any length any extracts from the opinion of the United States Supreme Court above referred to because all of the parties are familiar with the substance of that decision and its scope. [fol. 6] I am, therefore, concluding this memorandum decision merely with the statement that in my opinion the action taken by the Wisconsin Employment Relations

Board is without jurisdiction and void in the instant case.

The attorneys for the appellants will prepare such formal order or judgment as is necessary to carry out the indicated conclusion of the court.

Dated at La Crosse, Wisconsin, this 28th day of April, 1947.

By the Court, R. S. Cowie, Judge.

IN CIRCUIT COURT OF LA CROSSE COUNTY

PETITION FOR REVIEW (Omitting formal parts)

The petition of the LaCrosse Telephone Corporation of LaCrosse, Wisconsin, by its attorneys, Hale, Skemp and Nietsch, respectfully prays that the Circuit Court in and for LaCrosse County, Wisconsin, review the Findings, Orders, Decisions and Certification made by the Wisconsin Employment Relations Board in the proceedings had before said board in the matter entitled "The petition of the Telephone Guild of Wisconsin, affiliated with the National Federation of Telephone Workers for the determination of bargaining representatives of employees of the LaCrosse Telephone Corporation of LaCrosse," and in support of said petition respectfully represents and shows to the court:

[fol. 7] 1. That petitioner is a corporation organized and existing under and by virtue of the laws of the State of Wisconsin and is engaged in rendering communication service by wire in the city of LaCrosse and in interstate communications.

2. That the defendant Wisconsin Employment Relations Board and the members thereof constitute an administrative board pursuant to the provisions of Section 111.03 of the Wisconsin Statutes.

3. That on October 8, 1946, a petition was filed with the Wisconsin Employment Relations Board by the Telephone Guild of Wisconsin, affiliated with the Federation of Telephone Workers, requesting an election among the employes of the plaintiff for the purpose of determining what if any representations such employees desired for the purposes of collective bargaining; that a hearing on such petition

was conducted at LaCrosse, Wisconsin, on the 18th day of October, 1946; that on the 27th day of November, 1946 the defendant board entered and filed a direction of election as appears of record in said proceedings; that pursuant to such direction the defendant board conducted an election on the 17th day of December, 1946, in the city of LaCrosse, by use of ballots in the form which appear of record herein; that on the 14th day of January, 1947, the defendant filed its final decision in said matter which purports to determine the rights of this plaintiff LaCrosse Telephone Corporation, [fol. 8] the employees of the plaintiff, the Telephone Guild of Wisconsin, and the International Brotherhood of Electrical Workers, Local Union B-953; that said final decision and the other records and proceedings heretofore referred to are matters of record before the Wisconsin Employment Relations Board and upon the filing of the certified record and proceedings by such Board, the petitioner incorporates the same herein as though a part hereof.

4. That prior to the filing of the petition by the Telephone Guild of Wisconsin with the defendant Board, the plaintiff herein had consummated a binding agreement with its employees in the Plant and Traffic Department which by its terms was in full force and effect until the first day of December, 1947; that at the time of entering into said agreement plaintiff's employees in the Plant and Traffic Departments were members of the International Brotherhood of Electrical Workers, Local Union B-953 and said union was the only labor union in petitioner's establishment, and was the bargaining representative of said Plant and Traffic Department employees.

5. That upon the foregoing facts the LaCrosse Telephone Corporation of LaCrosse petitions for a review of the decision and all other proceedings before the Wisconsin Employment Relations Board in accordance with the provisions of the statutes of the State of Wisconsin in such case made and provided for the following reasons:

[fol. 9] (1) That the direction for an election as made by the defendant board on the 27th day of November, 1946 contained a memorandum in which the board erroneously found that no contract existed between the LaCrosse Telephone Corporation, and the International Brotherhood of Electrical Workers, Local B-953; that such finding by the

board was without its jurisdiction, in excess of its statutory authority, was erroneous as a matter of law, and contrary to the constitutional rights and privileges of the LaCrosse Telephone Corporation of LaCrosse; that the plaintiff and petitioner herein alleges that it has a valid and binding agreement with its Plant and Traffic Employees which is entered into with the duly authorized representatives of a duly constituted labor organization which contract is binding upon petitioner and said employees and was legally binding on said parties prior to the petition made by the Telephone Guild of Wisconsin to either the National Labor Relations Board or to the Wisconsin Employment Relations Board; that the finding of the defendant board as to the non existence of this contract was without the jurisdiction of the board; that the finding of the board as to the non-existence of this contract contravenes the rights of the plaintiff in that it is in violation of Article I Section 10 of the Federal Constitution which provides that no state shall make any law impairing the obligation of contracts, [fol. 10] the Fifth Amendment to the Constitution which prohibits the taking of life, liberty or property without due process of law, and the 14th Amendment to the Constitution which provides that no state shall deprive any person of life, liberty or property without due process of law, or deny any person within its jurisdiction the equal protection of the law.

(2) Petitioner further alleges that the form of the ballot which was used by the defendant board in conducting the election was ambiguous in form and incapable of interpretation by the employees or the defendant board and therefore does not constitute a sufficient basis for the certification of representatives by the defendant board in its decision on January 14, 1947; that said ballots and decision above referred to are a part of said record and are incorporated herein as a part of this petition.

Wherefore petitioner prays that the court review the Findings, Orders, Decisions, and Certification made by the Wisconsin Employment Relations Board and reverse and set aside the same, and to declare and determine that a contract exists between the La Crosse Telephone Corporation, the petitioner herein, and its employees in the Plant and Traffic Departments through its duly constituted labor organization, the International Brotherhood of Electrical

Workers, Local B-953, and to restrain any unfair labor [fol. 11] practices in violation of said contract and the constitutional rights and privileges of the petitioner.

In Circuit Court of La Crosse County

Notice of Appearance and Statement of Position of Wisconsin Employment Relations Board (Omitting formal parts)

Please take notice that the respondent (defendant), Wisconsin Employment Relations Board, appears in the above entitled matter by John E. Martin, Attorney General, Stewart G. Honeck, Deputy Attorney General, and Beatrice Lampert, Assistant Attorney General, its attorneys, and demands that a copy of all subsequent pleadings, documents, notices or other papers subsequent to the petition for review be served on said attorneys at their offices in the State Capitol, Madison 2, Wisconsin.

Take further notice that the position of said respondent is as follows:

That the certification of representatives and order made by the respondent board on January 14, 1947, which the petitioner seeks to review and set aside are not void or unlawful for any of the reasons set forth in the petition for review or for any other reason and alleges that the certification of representatives and order complained of are valid and lawful.

[fol. 12] Wherefore this respondent prays that the said certification and order be affirmed.

Dated at Madison, Wisconsin this 18th day of February, 1947.

[fol. 13] IN SUPREME COURT OF WISCONSIN

No. 61

INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, LOCAL B-953, A. F. OF L., Respondent,

v.

WISCONSIN EMPLOYMENT RELATIONS BOARD, L. E. GOODING, HENRY RULE AND J. E. FITZGIBBON AS MEMBERS OF THE WISCONSIN EMPLOYMENT RELATIONS BOARD, Appellants

Appellant's Appendix

IN CIRCUIT COURT OF LA CROSSE COUNTY

[fol. 14] MEMORANDUM DECISION (Printed in Appendix of LaCrosse Telephone Corp. v. W. E. R. B., et al.)

IN CIRCUIT COURT OF LA CROSSE COUNTY

Petition for Review (Omitting formal parts)

The Petitioner above named by Padway, Goldberg & Previant, its attorneys, respectfully prays that the Honorable Circuit Court in and for LaCrosse County, Wisconsin, review the findings, orders, decision and certification made by the Wisconsin Employment Relations Board, and reverse and set aside the same in the proceedings before that Board entitled "In the Matter of the Petition of Telephone Guild of Wisconsin affiliated with National Federation of Telephone Workers For Determination of Bargaining Representatives for Employees of the La Crosse Telephone Corporation of La Crosse".

In support of its Petition, Petitioner respectfully shows the Court as follows:

I

Petitioner is an unincorporated labor association affiliated with the American Federation of Labor, having its office and principal place of business in the City of Eau Claire, County [fol. 15] of Eau Claire, State of Wisconsin, and having a branch office in the City of LaCrosse, County of LaCrosse, State of Wisconsin.

II

The Respondent, Wisconsin Employment Relations Board and the individual members thereof, constitute an adminis-

trative body existing under and by virtue of Chapter 111, Wisconsin Statutes, having its principal office in the City of Madison, Dane County, Wisconsin.

III

The LaCrosse Telephone Corporation of LaCrosse is a Wisconsin corporation with its principal office in the City of LaCrosse, and is engaged in the furnishing of telephone communication both within the State of Wisconsin and to various and numerous points outside the State of Wisconsin and throughout the United States.

IV

The LaCrosse Telephone Corporation of LaCrosse is engaged in interstate commerce within the terms and meanings [fol. 16] of the National Labor Relations Act (29 U. S. Code, Sections 151-166), and questions concerning the representations of said employees of said Company are questions affecting commerce within the terms and definitions of the aforesaid Act.

V

For a number of years last past a large majority of the employees of the LaCrosse Telephone Corporation of La Crosse were members of the Petitioner Union and had designated the Petitioner Union as their bargaining representative.

VI

Prior to September 20, 1946, the LaCrosse Telephone Corporation and the Petitioner entered into collective bargaining agreements covering the employees in the Traffic and Plant Departments for the period extending to December 1, 1947.

VII

On September 20, 1946, the Telephone Guild of Wisconsin affiliated with the National Federation of Telephone Workers, an unincorporated voluntary association operating as [fol. 17] a labor union, filed a Petition with the National Labor Relations Board at its Regional Office in Minneapolis, Minnesota, requesting that Board to investigate a question of representation which had allegedly arisen among all employees of the LaCrosse Telephone Corporation, and ask-

ing that it be certified as a collective bargaining representative for all such employees.

Notice of the filing of said Petition was received by the LaCrosse Telephone Corporation on or about September 26, 1946, after the LaCrosse Telephone Corporation and Petitioner had already entered into a collective bargaining agreement for the period to December 1, 1947. The National Labor Relations Board has not relinquished the jurisdiction conferred upon it by the filing of said Petition.

VIII

On October 8, 1946, a Petition for Certification of Representatives was filed with the Wisconsin Employment Relations Board by the Telephone Guild of Wisconsin affiliated with the National Federation of Telephone Workers, and that hearing was had thereon on the 18th day of October, 1946.

[fol. 18]

IX

On the 27th day of November, 1946, the Wisconsin Employment Relations Board directed that an election be conducted among certain employees of the LaCrosse Telephone Corporation, and in an accompanying decision said Board erroneously found that there was no binding agreement in effect between the LaCrosse Telephone Corporation and International Brotherhood of Electrical Workers, Local Union No. B-953, at the time when the Company received notice that the Telephone Guild of Wisconsin claimed to represent a majority of the employees, and such Direction of Election was predicated upon such erroneous finding.

X

Pursuant to said Direction of Election an election was conducted by the Wisconsin Employment Relations Board on the 17th day of December, 1946, following which the Wisconsin Employment Relations Board on the 14th day of January, 1947, certified the Telephone Guild of Wisconsin as the exclusive collective bargaining representative, for all employees in the Traffic and Plant Departments excluding executive and supervisory employees.

[fol. 19] XI

The various matters afore referred to are more specifically set forth in the record and proceedings before the Wisconsin Employment Relations Board, and upon the filing of such record and proceedings herein by said Wisconsin Employment Relations Board, the Petitioner incorporates the same herein as though a part hereof.

XII

The decisions, orders, and certification of the Wisconsin Employment Relations Board are

1. Unsupported by substantial evidence in view of the entire record as submitted, in that the Board erred in finding that there was no binding agreement in effect between Petitioner and LaCrosse Telephone Corporation at the time such corporation first learned of the claim of the Telephone Guild of Wisconsin that it represented a majority of all employees of the La Crosse Telephone Corporation; and in that the employees were required to express their choice on ballots that were ambiguous in form and incapable of being properly understood.

2. Contrary to the constitutional rights and privileges of the Petitioner in that Chapter 111 of the Wisconsin Statutes has been so construed and applied as to bring it into conflict with the Act of Congress known [fol. 20] as the National Labor Relations Act, 49 Stat. 449 and the rulings and decisions of the National Labor Relations Board thereunder contrary to Article I, Section 8, and Article VI of the Constitution of the United States, and in that Petitioner has been deprived of liberty and property without due process of law and has been denied the equal protection of the laws contrary to the provisions of the Fourteenth Amendment to the Constitution of the United States and has had the obligation of its contract impaired in violation of Section 10, Article I of the Constitution of the United States.

XIII

The Wisconsin Employment Relations Board had no jurisdiction over the subject matter for the reason that the National Labor Relations Board had previously undertaken

to exercise the jurisdiction which the National Labor Relations Act conferred upon it, and has not insofar as the record discloses relinquished such jurisdiction.

XIV

The decision and order of the Wisconsin Employment Relations Board affects the status of the employees of the [fol. 21] LaCrosse Telephone Corporation, and causes a forfeiture of collective bargaining rights guaranteed to the Petitioner under the National Labor Relations Act.

XV

The certification made by the Wisconsin Employment Relations Board is in excess of its statutory authority and jurisdiction because the La Crosse Telephone Corporation is engaged in interstate commerce, and the question of the representation of its employees is therefore a matter within the jurisdiction of the National Labor Relations Board under the National Labor Relations Act, and in that it had no authority or jurisdiction to direct an election where there was in existence a collective bargaining agreement which was executed prior to the time the LaCrosse Telephone Corporation received notice that some other Organization claimed to represent a majority of the employees in the units affected.

XVI

The certification is outside the statutory authority or jurisdiction of the Board, in that the results of the balloting [fol. 22] in the various units did not afford sufficient basis for the certification issued.

Wherefore, Petitioner prays that the certification of the Wisconsin Employment Relations Board be reversed, set aside, and held for naught.

In Circuit Court of La Crosse County

Notice of Appearance and Statement of Position of Wisconsin Employment Relations Board (Omitting Formal Parts)

Please Take Notice that the respondent (defendant), Wisconsin Employment Relations Board, appears in the above

entitled matter by John E. Martin, Attorney General, Stewart G. Honeck, Deputy Attorney General, and Beatrice Lampert, Assistant Attorney General, its attorneys, and demands that a copy of all subsequent pleadings, documents, notices or other papers subsequent to the petition for review be served on said attorneys at their offices in the State Capitol, Madison 2, Wisconsin.

Take Further Notice that the position of said respondent is as follows:

That the certification of representatives and order made by the respondent board on January 14, 1947, which the petitioner seeks to review and set aside are not void or unlawful for any of the reasons set forth in the petition for review or for any other reason and alleges that the certification of [fol. 23] representatives and order complained of are valid and lawful.

Wherefore this respondent prays that the said certification and order be affirmed.

Dated at Madison, Wisconsin this 18th day of February, 1947.

In Circuit Court of La Crosse County

Judgment (Omitting Formal Parts)

The Petition of International Brotherhood of Electrical Workers, Local B-953, A. F. of L., to set aside the certification of the Wisconsin Employment Relations Board, made and entered on the 14th day of January, 1947, in the proceedings before that Board entitled "In the Matter of the Petition of Telephone Guild of Wisconsin, affiliated with National Federation of Telephone Workers, For Determination of Bargaining Representatives for Employees of The La Crosse Telephone Corporation of La Crosse", having come on for hearing on the 27th day of March, 1947, before this Court, the Honorable Robert S. Cowie presiding, the International Brotherhood of Electrical Workers, Local B-953, A. F. of L. appearing by Padway, Goldberg & Previant, represented by David Previant, its attorneys; the Wisconsin Employment Relations Board appearing by John E. Martin, Attorney General, Stewart G. Honeck, Deputy [fol. 24] Attorney General, and Beatrice Lampert, Assistant Attorney General, its Attorneys; the La Crosse Telephone

Corporation appearing by Hale, Skemp & Nietsch, represented by Thomas H. Skemp, its attorneys, and the Telephone Guild of Wisconsin appearing by Donald J. Martin, its attorney, and the Court having heard the arguments of the parties, having taken the matter under advisement, having studied the briefs submitted, and having made its written decision in said matter under date of April 28, 1947, in which the Court concluded that the action taken by the Wisconsin Employment Relations Board was without jurisdiction and void, now therefore,

It Is Ordered, Adjudged and Decreed that the Petition of the International Brotherhood of Electrical Workers, Local B-953, A. F. of L. praying that the certification of the Wisconsin Employment Relations Board afore referred to be reversed, set aside and held for naught, is granted, and the certification of said Board is herewith reversed and set aside.

Before Wisconsin Employment Relations Board

Certification of Representatives (Omitting Formal Parts)

[fol. 25] The Wisconsin Employment Relations Board having held a hearing on the 18th day of October, 1946, on a petition for the determination of representatives for certain employes of the La Crosse Telephone Corporation, and the Board having issued on the 27th day of November, 1946, a Direction of Election, and having conducted an election by secret ballot on the 17th day of December, 1946, in the City of La Crosse, La Crosse County, Wisconsin, and having found that the results of the election were as follows:

Traffic Department—Question No. 1

Do you desire to have the Traffic Department employes of the La Crosse Telephone Corporation bargain collectively as a separate unit (group)?

1. Total number eligible to vote	114
2. Total ballots cast	68
3. Total ballots challenged	0
4. Total ballots void	0
5. Total ballots blank	3
6. Total valid ballots counted	65

	13
7. Ballots cast in favor of separate unit	13
8. Ballots cast against separate unit	52

Question No. 2

1. Total number eligible to vote	114
2. Total ballots cast	68
3. Total ballots challenged	0
4. Total ballots void	0
[fol. 26]	
5. Total ballots blank	1
6. Total valid ballots counted	67
7. Ballots cast for the Telephone Guild of Wisconsin affiliated with the National Federation of Telephone Workers	64
8. Ballots cast for the International Brotherhood of Electrical Workers, Local Union B-953, affiliated with the A. F. L.	1
9. Ballots cast for Neither	2

Plant Department—Question No. 1

Do you desire to have the Plant Department employes of the La Crosse Telephone Corporation bargain collectively as a separate unit (group)?

1. Total number eligible to vote	40
2. Total ballots cast	40
3. Total ballots challenged	0
4. Total ballots void	1
5. Total ballots blank	2
6. Total valid ballots counted	37
7. Ballots cast in favor of separate unit	12
8. Ballots cast against separate unit	25

Question No. 2

1. Total number eligible to vote	40
2. Total ballots cast	40
3. Total ballots challenged	0
4. Total ballots void	0
5. Total ballots blank	0
6. Total valid ballots counted	40
[fol. 27]	
7. Ballots cast for the Telephone Guild of Wisconsin affiliated with the National Federation of Telephone Workers	27

8. Ballots cast for the International Brotherhood of Electrical Workers, Local Union B-953, affiliated with the A. F. L. 13
9. Ballots cast for Neither 0

Office Employes—Question No. 1

Do you desire to have the office employes of the La Crosse Telephone Corporation bargain collectively as a separate unit (group)?

1. Total number eligible to vote 31
2. Total ballots cast 28
3. Total ballots challenged 0
4. Total ballots void 0
5. Total ballots blank 0
6. Total valid ballots counted 28
7. Ballots cast in favor of separate unit 18
8. Ballots cast against separate unit 10

Question No. 2

1. Total number eligible to vote 31
2. Total ballots cast 28
3. Total ballots challenged 0
4. Total ballots void 0
5. Total ballots blank 0
6. Total valid ballots counted 28

[fol. 28]

7. Ballots cast for the Telephone Guild of Wisconsin affiliated with the National Federation of Telephone Workers 10
8. Ballots cast against the Telephone Guild of Wisconsin affiliated with the National Federation of Telephone Workers 18

Now, Therefore, by virtue of and pursuant to the power vested in the Wisconsin Employment Relations Board by Section 111.05 (2) and (3) of the Wisconsin Statutes;

It Is Hereby Certified that a majority of the eligible employes of the La Crosse Telephone Corporation in the unit consisting of office employes chose to constitute themselves a separate unit for the purposes of bargaining collectively with the La Crosse Telephone Corporation, and that a majority of such employes selected no union as their collective bargaining representative, and therefore the peti-

tion for determination of collective bargaining representatives for the office employes of the La Crosse Telephone Corporation is hereby dismissed.

It Is Further Certified that a majority of the employes in the Traffic Department and Plant Department of the La Crosse Telephone Corporation each voted not to constitute themselves a separate collective bargaining unit and that such employes constitute all the employes of the La Crosse [fol. 29] Telephone Corporation, excluding the office employes, and that a majority of the employes in both of said Traffic Department and Plant Department selected the Telephone Guild of Wisconsin, affiliated with the National Federation of Telephone Workers as their collective bargaining representative, and that, pursuant to the sections of Section 111.05 of the Wisconsin Statutes, the said Telephone Guild of Wisconsin affiliated with the National Federation of Telephone Workers, is the exclusive collective bargaining representative of all the employes of the La Crosse Telephone Corporation in a unit consisting of all Traffic Department employes and all Plant Department employes, excluding executives and supervisory employes, in respect to rates of pay, wages, hours, and other conditions of employment.

Before Wisconsin Employment Relations Board

Direction of Election (Omitting Formal Parts)

Petition having been filed with the Wisconsin Employment Relations Board by the Telephone Guild of Wisconsin, affiliated with the Federation of Telephone Workers, requesting that an election be conducted among the employes of the La Crosse Telephone Corporation of La Crosse, Wisconsin, for the purpose of determining what, if any representation such employes desire for the purpose of collective bargaining; and a hearing on such petition having been [fol. 30] conducted at La Crosse, Wisconsin, on the 18th day of October, 1946; and the Board having considered the evidence and being satisfied that questions have arisen concerning the collective bargaining units as well as representation for the employes of the La Crosse Telephone Corporation;

Now, Therefore, it is Directed

That an election by secret ballot be conducted under the direction of the Wisconsin Employment Relations Board within thirty (30) days from the date of this Directive among all Plant Department employes of the La Crosse Telephone Corporation, excluding executives and supervisory employes who were employed on the 18th day of October, 1946, except such employes as may prior to the election quit their employment or be discharged for cause for the purpose of determining; (1) whether or not a majority of such employes desire to constitute themselves a separate unit for the purpose of collective bargaining; and (2) whether a majority of such employes desire to be represented for the purposes of collective bargaining by the Telephone Guild of Wisconsin affiliated with the National Federation of Telephone Workers, by the International [fol. 31] Brotherhood of Electrical Workers, Local Union B-953, affiliated with the American Federation of Labor; or by neither of such organizations.

It is further directed that at the same time an election be conducted among all Traffic Department employes, excluding executives and supervisors, who were employed on the 18th day of October, 1946, except such employes as may prior to the election quit their employment or be discharged for cause, for the purpose of determining; (1) whether or not a majority of such employes desire to constitute themselves a separate unit for the purposes of collective bargaining; and (2) whether a majority of such employes desire to be represented for the purposes of collective bargaining by the Telephone Guild of Wisconsin affiliated with the National Federation of Telephone Workers, by the International Brotherhood of Electrical Workers, Local Union B-953, affiliated with the American Federation of Labor; or by neither of such organizations.

It is further directed that at the same time an election be conducted among all office employes, employed by the La Crosse Telephone Corporation, excluding executives and supervisory employes who were employed on the 18th day of October, 1946, except such employes as may prior to the election quit their employment or be discharged for cause, for the purpose of determining; (1) whether or not [fol. 32] a majority of such employes desire to constitute themselves a separate unit for the purposes of collective bargaining; and (2) whether a majority of such employes desire to be represented for the purposes of collective bar-

gaining by the Telephone Guild of Wisconsin, affiliated with the National Federation of Telephone Workers.

Given under our hands and seal at the City of Madison, Wisconsin, this 27th day of November, 1946.

MEMORANDUM ACCOMPANYING DIRECTION OF ELECTION
(Omitting Formal Parts)

On September 20, 1946, the Telephone Guild of Wisconsin filed with the National Labor Relations Board a petition for an election among certain employes of the La Crosse Telephone Corporation. The company received notice of this petition by a letter dated September 24th mailed from the office of the National Labor Relations Board at Minneapolis. At the time the petition was filed before the National Board there was in effect a collective bargaining agreement between the La Crosse Telephone Corporation and the I. B. E. W., which contract by its terms, expired on December 1, 1946.

Prior to the receipt by the company of the notice from the National Labor Relations Board that the Telephone [fol. 33] Guild was claiming to be the representative of all of its employes, the company had carried on negotiations with local committees resulting in an agreement on the part of the company to increase the wage rates of its employes. These negotiations were carried on the last of August and the first part of September. On September 23, at a meeting of one of the groups represented by the union, the offer of the company was rejected because the agreement contained no satisfactory re-opening date at which time the wage question might be reviewed. On September 25, at a union meeting, a re-opening date negotiated with the company was finally approved and the company notified of such approval on September 26th or 27th.

There was, therefore, in effect a collective bargaining agreement from September 27th, 1946 that would extend to December 1, 1947. We are satisfied, however, that such agreement was finally arrived at at the time the employer was given notice by the union that the re-opening date was satisfactory and that until such time, no binding agreement had been entered into between the employer and the union. There was, therefore, no binding agreement when the company was notified that another union claimed to represent a majority of the employes that the I. B. E. W. proposed to

represent, and a contract entered into subsequent to the receipt of such notice cannot operate as a bar to an election. [fol. 34] We have, therefore, directed the conduct of an election and in our direction have given the employes in the Plant Department, the Traffic Department, and the Office Department an opportunity to determine whether they desire to constitute themselves separate units or not. In the Plant Department and the Traffic Department both the Telephone Guild and the I. B. E. W. will appear on the ballot, while in the Office Department, because of the fact that the I. B. E. W. does not desire to represent such employes, the only question submitted will be whether the employes desire to be represented by the Telephone Guild or not.

BEFORE WISCONSIN EMPLOYMENT RELATIONS BOARD

Transcript of Hearing

Pursuant to notice, the above entitled matter came on for hearing before the Wisconsin Employment Relations Board in the La Crosse County Court House, La Crosse, Wisconsin, on Friday, October 18, 1946, commencing at 10:00 A. M.

Present: Chairman L. E. Gooding.

APPEARANCES:

Mr. Donald J. Martin, Attorney, and Mr. Ray F. Dryer, Executive Secretary, for the Telephone Guild of Wisconsin. [fol. 35] Hale, Skemp and Nietsch, by Mr. T. H. Skemp, Attorney, for La Crosse Telephone Corporation.

Local Union B-953, Int'l Brotherhood of Electrical Workers, by Padway and Goldberg, Attorneys, by David Previant.

Whereupon the following proceedings were held:

* * * * * * *

Mr. Martin: A petition was originally filed with the National Labor Relations Board on September 20, Mr. Gooding, asking for a unit defined as all employes of the La Crosse Telephone Company. An informal conference was held and the Guild withdrew—that is, the petition from

the National Labor Relations Board. We filed the petition which we have here on October 8th with the State Board. The employes speaking of are presently covered by a contract with the International Brotherhood of Electrical Workers.

Ray F. Dryer, being first duly sworn, testified:

Direct examination.

By Mr. Martin:

I am executive secretary of the Telephone Guild of Wisconsin affiliated with the National Federation of Telephone workers. We admit to membership all telephone workers in the state. We have had a request from the employees of the [fol. 56] La Crosse telephone company for membership and they have supplied us with approximately 85 applications which we are informed is over 50%. Those applications for membership cards were signed during the months of August and September of this year.

Cross-examination.

By Mr. Previant:

We have petitioned for an election among the employes of the company because it is felt that all employees should be covered by contract with the company. It would be our desire that if an election would be conducted, it would be conducted among all employees eligible for union membership which excludes executives and supervisory employees. If it were found to be more practical to have only the employees represented by the International Brotherhood of Electrical Workers, we would be willing to exclude others.

E. B. Samp, being first duly sworn, testified:

Direct examination.

By Mr. Martin:

I am vice president and manager of the La Crosse Telephone Corporation. I handle matters which relate to labor problems for that company. We have a contract covering

our employees in the plant and traffic departments at the present time with the A. F. of L., International Brotherhood of Electrical Workers. That contract expires December 1, 1946.

[fol. 37] There were changes made in the contract recently, principally wage adjustments. The wage adjustments were put into effect September 1st. I think the first pay check under them was October 3rd made retroactive to September 1st.

The agreement respecting those wage increases was made with the men of the plant department September 3rd and the traffic department September 12 or 13. The reason payment was not put into effect sooner was a matter of adjusting the payroll—a considerable amount of work due to the fact the plant department at that time was on a 44 hour week and we had to go back and figure adjustments to September 1st on the new rate. Our office is in confusion in regard to payments at this time, in regard to the transfer of the accounting from our office to the division office.

I was satisfied that the agreements with respect to those wages were in effect as of September 3rd for the men and September 12 or 13 for the traffic. After those dates we had some discussion when members of the union signed the agreement—the mechanics of the signing, the same as we usually have after the agreement is reached. On September 20, 1946, we discussed with Mr. Boyle at Chicago on the telephone, not the wages but another amendment we wanted to make in regard to an earlier date for opening the contract for new wage negotiations. At our original meeting we did not definitely arrive at the dates of opening the con-[fol. 38] tract for new wage negotiations. We felt and the committee felt probably December 1, 1947 would be too late which would permit us to open the contract for new wage negotiations; it should be earlier than that. That was mutual agreement. In other words, the contract cannot be opened March 1, 1947 except at mutual agreement. It can be reopened at the request of either party. The agreement with respect to the reopening clause was September 25. That agreement was reached with most of the committee and Mr. Wetchen and Mr. Panzer.

The agreements of September 3 and 12 or 13 was a notification from the shop stewards that their membership had voted on wage proposals and accepted them. Those pro-

posal originated from committee of members coming into my office and asking to negotiate wages.

That negotiation was carried on with the traffic department August 31st and with the plant department September 3rd. On both occasions the agreements were reached with committee members at the plant of the company. The International Brotherhood of Electrical Workers, Local B-953 was not consulted by the company with respect to this agreement. The previous practice was to negotiate wages with the committee. The International Brotherhood of Electrical Workers was consulted with respect to those wage increases in previous years.

[fol. 39] We considered the agreement as final before the officers of the electrical workers had accepted the wage agreements. That had been the general practice where the committee and the company agreed on wages, that is it became effective on the date they agreed upon and signed the contract. We considered the mechanics of getting the contract signed but we would not never hold up wage adjustments waiting to get the contract signed.

The agreement with respect to wages was signed by committee members at that time. I have a letter here dated September 12 signed by the shop steward of the traffic department which says: "A special meeting of local and toll operators of the La Crosse Telephone Company was held Wednesday, September 11, 1946. The purpose of this meeting was to discuss new wage scales as recommended by the La Crosse Telephone Corporation. The letter to Mr. Ray Panzer, Business Agent, B-953, I. B. E. W. was read to the group. After a short discussion a rising vote was taken; a vote of 30 to 0 in favor of the new wage scale was recorded. We are taking this means of notifying the La Crosse Telephone Corporation of our acceptance of the new wage rate." • • • The contract amendment respecting the wage increase has probably not been signed by the officials of the company. In fact I don't think it has come back from the International. [fol. 40] There is no agreement completely executed at this time with respect to that.

Mr. Previant: That question calls for a conclusion as to what is a completely executed contract and we therefore object to it.

Q. I will withdraw my question with respect to that.

With respect to this letter the amendment and wages was accepted by the stewards on September 12 and by the mem-

bership on September 11. An agreement with respect to a reopening clause wasn't effective until September 25. A separate amendment was drawn up to cover the reopening clause. It has not been signed by the company. We are waiting for both the amendment with respect to wages and the amendment with respect to the reopening clause.

The letter I just read covers only traffic. The amendments I am referring to covered both plant and traffic. The amendments we are waiting for execution apply to both traffic and plant.

The International Brotherhood of Electrical Workers notified me they had accepted the agreement with respect to wages of the plant people on September 27. The I. B. E. W. office notified me September 27 that they had accepted the changes with respect to wages and with respect to the reopening clause.

[fol. 41] With respect to the plant people I was satisfied previous to September 27 that this had been acceptable, but I had not been notified and no agreement had been made with respect to that situation. I was satisfied the agreement was in effect September 25.

Cross-Examination.

By Mr. Previant:

When I referred to a contract which expires December 1st I have reference to Exhibit 3. That agreement calls for a 90 day notice to stop an automatic renewal. I did not get such notice 90 days prior to December 1, 1946. I got a communication from the union indicating the desire of the union to make an amendment to that agreement. I have reference to a letter on the stationery of the I. B. E. W., Local Union B-953, Eau Claire, Wisconsin, dated August 28, 1946 and addressed to E. B. Samp, Vice-President and Manager, La Crosse Telephone Corporation which reads: "Dear Mr. Samp: To meet the notice requirements of our agreement, we wish to notify you we desire to amend the agreement. The amendments will be drawn up and presented within the required time limits of the agreement. Yours very truly, Local Union B-953, I. B. E. W."

After receipt of that letter I conferred with the bargaining committees of both the traffic and plant departments; with the traffic department August 31st and plant depart-

[fol. 42] ment September 3rd. With respect to the traffic department that committee and our company arrived at an agreement which was reduced to writing and signed by members of the committee and me. I am referring to a letter dated August 31, 1946 addressed to Mr. Ray A. Panzer, Local Union B-953, I. B. E. W., Eau Claire, Wisconsin, which has typewritten signatures of members of the committee and sets forth a wage schedule to be incorporated in Article 5 of the agreement.

With reference to the meeting of the plant division on September 3, 1946 I have in my file a similar letter bearing the typewritten signatures of the committee relating to proposed changes to be incorporated in Article VI. These are copies of the originals which were forwarded to Mr. Panzer. So then as of August 31st with respect to the traffic department and as of September 3 with respect to the plant department I had entered into an agreement in writing with the bargaining committee of those various departments making changes in the wage articles of the agreement which was to expire December 1, 1946. . . .

Subsequently in addition to these proposed wage changes I agreed with the representatives of the union to a wage reopening clause. It provides in substance either party on 30 days notice prior to March 1, 1947 could give notice of a desire to negotiate changes in the wage clauses of the agree-
[fol. 43] ment. Then it was my understanding that the agreement went on to December 1947. That would have been the original agreement which was to have expired December 1, 1946 as amended but would then continue on to December 1, 1947. So when I said we have a contract which expires December 1, 1946 I was referring to the original unamended contract which has that expiration date. As of today our agreement with Local B-953 expires December 1, 1947.

The La Crosse Telephone Corporation is a subsidiary of the Central Telephone Company which has other corporations in Illinois, Virginia and many states. Other subsidiaries of that parent corporation have telephone companies in the Chicago Illinois area. A contract covering the telephone utility in Chicago was negotiated in August, 1946. That was also negotiated with local unions affiliated with the International of the I. B. E. W. That has a bearing upon the fact that our negotiations were concluded as quickly as they were and at the time they were. We made negotiations

for a new wage scale for what we call the Park Ridge District in Illinois to become effective September 1st and we felt since we raised the wages there and were going to place new wages into effect there that we would likewise do so here due to the fact that wages were lower and we wanted to get them somewhere near so we would not have dissention. Park Ridge is operated from the La Crosse office. That was the [fol. 44] reason these negotiations were commenced and the contracts executed as they were, rather than wait until December first, or sometime thereafter. There was considerable agitation by the plant men to go back to 40 hours a week and several times we heard discussions by some of the department heads or supervisors that the men were unrestful and wanted to return to the 40 hour week as quickly as possible.

Redirect Examination.

By Mr. Martin:

I testified that I was satisfied with these amendments, but they have not been signed. I think certain evidence in the file would show we did agree, and that the matter of signing had to go to the international office and to our general office and be signed by the general manager and the general treasurer of the company.

I am not certain as of this date if they have been signed. I can only assume they will be and that they are. It has been one of our practices after completing wage negotiations that the contracts are then sent to our International and to our general offices for signature.

It is not exactly necessary to get approval before an agreement can be considered in effect. I am vice president of the company and I can obligate the company. It is a matter of formality as far as we are concerned which has been followed [fol. 45] over a period of years.

Examination.

By Mr. Gooding:

The only written request we had respecting the proposed amendments referred to in the letter of August 28 was the one the committee and the shop steward brought in August 31st. On August 31st and early in September I arrived at an agreement with the plant department and traffic depart-

ment as to their change in wages. With respect to the traffic department there were no other changes made in the proposed 1947 agreement except in wages. With respect to the plant department it was a change in working hours which was agreed upon at the same time. The reopening clause was negotiated September 25. That was negotiated between myself representing the company and the committee representing the union. Mr. Panzer was on the committee. It was after September 25 that the matters were reduced to writing and the new contract drafted. That was to be submitted for signatures. The final agreement was arrived at, all the terms were incorporated, as a result of the agreement of September 25.

The date we received the letter notifying us that the Telephone Guild of Wisconsin claimed to represent the employees is not stamped. We received a letter from N. L. R. [fol. 46] B. dated September 24 informing us that the Telephone Guild of Wisconsin had filed a petition alleging that a question of representation had arisen. That is the first notice we had of the Guild's claim to represent any of the employees. The letter was addressed from Minneapolis.

Thereafter there was a meeting between the company and representatives of the two unions about September 30, five or six days after the letter.

I received the letter from the N. L. R. B. after the meeting of September 25.

Redirect Examination.

By Mr. Martin:

We did not have separate negotiations with respect to reopening date for the traffic and plant departments. The men we were negotiating with was to affect plant and traffic alike. No date other than March 30 was agreed upon at any time. There was discussion with respect to a June reopening clause to affect both departments.

The notice given by the union 90 days prior to the expiration date of the 1946 contract that it desired to amend the contract did not specify wages. It just said amendments. The amendments negotiated as I indicated before covered the reopening clause for March.

[fol. 47] Recross Examination.

By Mr. Previant:

These agreements of August 31 and September 3 were signed by me. That is, the letter and the agreement which was sent to Mr. Panzer was signed by the members of the committees with whom I met and by me. Our written signatures appeared on those summaries of the results of the meeting or the statement of the results of the meeting.

Cross-Examination.

By Mr. Skemp:

The letters I have been questioned about that are in my file are exact copies of the originals sent to Mr. Panzer. The original was signed by all the persons whose typewritten signatures appear on the copy. The signatures are: For the committee of employees that negotiated with me for the traffic department, Rose Konop, Sigrid Braathen, Alice Olson, Ann Louise Schmaltz. For the company, E. B. Samp. For the plant department, for the committee that negotiated with me: Pearl Pearson, Philip Haag, Robert Schultz, George Rief. Accepted for the company by E. B. Samp, Manager. • • •

[fol. 48] Clifford Wetchen, being first duly sworn, testified:

Direct Examination.

By Mr. Martin:

I am a representative of the International Brotherhood of Electrical Workers. I participated in the final discussion with respect to wage amendments and amendment of the reopening clause, not in the preliminary. I am familiar only vaguely what took place in the preliminary stages of the discussion.

I first got in on these discussions at a meeting held on September 18, Wednesday night. My first entry into the picture consisted of attendance at a meeting which was held the night of September 18. It was a meeting of the plant department employees. A discussion was had on amendments and the wage increases agreed upon by the company and the committee of employees. They agreed to submit

further amendments that would be presented by an amendment committee.

The following day I accompanied Mr. Panzer and we met with the management. No amendments in particular were discussed on that day, September 19. The discussion did center around future amendments that would be submitted which would improve the wage increase that had been agreed to. Those amendments were not submitted to management in the form of writing; they developed through [fol. 49] discussion as a means of improvement of agreed wage increases. That was with respect to the wage increase for both plant and traffic departments.

I believe the date when those amendments which we had discussed were ratified by our plant and traffic groups was somewhere around September 25 at a specially called meeting held in the evening.

At that time there was no discussion with respect to approving the wage increases, but it was in regard to the paragraph providing for wage reopening as of March 1st which would become effective April 1st. At this meeting of September 25 they voted on the amendments. They balloted three times. The first ballot turned out 14 to 14. The second ballot was 14 to 14 and the third ballot was 13 in favor and 12 against as I recall due to the fact that some members had left the meeting prior to the third balloting.

The following day on September 26 we notified management that the plant people had accepted the amendment with respect to the reopening clause on wages.

With respect to the traffic employees I was not in on those negotiations at all. With respect to the amendment on the reopening clause a formal notice was sent to management from the Eau Claire office. I don't know the date. It was sent subsequent to this meeting of September 25 as a result [fol. 50] of the meeting with respect to ratifying the amendment on the part of the plant people. * * *

It has been the past practice that the committee has met with management and reached an agreement on the amendment. * * * There had been some discussion about the committee meeting with management without the presence of the business manager. The discussion took several forms and if I recall correctly the position of the local union was that at meetings the approval of the membership was satisfactory to the local union. The approval of the membership was satisfactory to the local union and as a result was ap-

proved in the proper manner, with the amendment that would provide for a reopening clause. There was some discussion among members that the agreements as discussed by management and the committee were illegal. I don't believe that I myself personally informed any of the members that it was illegal or void and the information as I recall informed the membership that it was just a matter of formality for the officers of the local union to meet with management for a satisfactory agreement on the amendments.

The past practice has been that the negotiating committee met with management and the result of those meetings, an agreement being reached between the committee and management, the agreement on amendments have been sub-
[fol. 51] mitted to the membership for their approval.

Cross-Examination.

By Mr. Skemp:

As far as our relationship with the La Crosse Telephone Company has been in the past I have considered that the agreement made by the committee for the telephone corporation as a binding agreement.

Raymond A. Panzer, being first duly sworn, testified:

Direct Examination.

By Mr. Martin:

I am business manager of Local B-953. Eau Claire is my residence. My position should be in general the representative of the International Brotherhood of Electrical Workers that handles labor relations with the I. B. E. W. for the La Crosse Telephone Corporation. I wish to show there the capacity of business manager is a salaried position and changes from time to time. I thought you inferred from the question had I handled the relations in the past.

As the representative of the I. B. E. W. at Eau Claire I would generally be the person handling any matters involving the union of the La Crosse Telephone corporation.
[fol. 52] There is a Mr. Elliott at Eau Claire with me. He is president of the local union. He has taken my place if I was away due to conventions or things of that sort. At such

times he has acted as business representative. Mr. Elliott informed me that two employees of the La Crosse Telephone Corporation had approached him with respect to these amendments to the existing agreement with the La Crosse Telephone Company. The query as Mr. Elliott informed me was with respect to immediate approval of agreement as negotiated by the committees. • • • Mr. Elliott informed me that he answered the employees inquiry to the effect that he himself did not wish to assume responsibility for their approval prior to consulting with me so there was no definite statement on his part with respect to accepting the agreement that the employees discussed with him on the part of the I. B. E. W.

I attended a meeting at La Crosse with respect to the plant people on September 18. I attended another on September 23. At the meeting of September 23 there was discussion respecting these amendments to the existing agreement. It assumed the nature of a vote of acceptance or rejection. That vote was 25 to 5 on the part of membership against accepting the amendments upon the recommendation of myself to reject as submitted unless modified with the reopening clause.

[fol. 53] I had discussed a reopening clause with our International vice president Boyle on September 19 or 20. If I remember right we had approached the company on this reopening clause on September 19. We agreed with the company on a proposed reopening clause about September 19 with a reopening date of May 1st or June 1st. The reopening date of June 1st was agreeable to me because in my opinion it was better than December 1, 1947.

Perhaps I am confused in the date of discussing the reopening clause with the company.

September 23 is the date of the meeting at which the proposed amendment was rejected. That proposed amendment was rejected upon my recommendation because of the lack of a proper date on our clause for wage reopening. There was a date submitted for wage reopening but the precise date was not set. At the September 23 meeting the amendment provided for wage review and the date was to be May 1, 1947 and such wages would be effective June 1st. That was the reason that I recommended rejection at the September 23 meeting. I was not satisfied with the May 1st and June 1st reopening dates.

Subsequent to that meeting there were discussions between me and the company with respect to changing the reopening dates. The discussions resulted in an advance of the date of reopening to March 1, 1947. Subsequent to [fol. 54] that a meeting was held on the evening of September 25 to consider approving or rejecting the amendments. The results of the ballot held at that meeting were substantially as Mr. Wetchen testified.

I believe I notified the company subsequent to this meeting that the members had ratified the proposed amendment. I notified the company by mailing to Mr. Samp of the Telephone Corporation copies of letters mailed to M. J. Boyle.

Subsequent to this meeting of September 25 the amendment was reduced to writing covering the change of the reopening date of the contract in regard to wages. * * * The amendment respecting wage reopening was not signed subsequent to the meeting of September 25 except by correspondence indicating it as being approved. Outside of that so far as I know no signatures have been attached to anything which contains a renewal clause as of March 1, 1947. * * *

We have approximately 85 members at La Crosse. Not every employee of the telephone corporation is a member of the I. B. E. W., Local B-953. To the best of my knowledge, all members in the plant and traffic departments are members of I. B. E. W. As far as I know they are dues-paying members. As far as I know temporary help may not be paying dues but so far as I know we assume all the other employees of the plant and traffic departments are paying dues. I don't have the records.

[fol. 55] Recross-examination.

By Mr. Previant:

The negotiations for the $30 a month increase and the return to the 40 hour week which had been agreed upon between the company and the union on September 3 was satisfactory. Further negotiations were for the purpose of coupling that amendment with the wage reopening clause. These meetings of September 23 and 25 related to the acceptability of a wage reopening clause having a termination date either as of May 1st which was the original proposal of the company or a termination date of March 1st which was the subsequent proposal of the company and accepted by

the union. As far as the wage or hours which had been entered into on September 3 that was satisfactory all the way through—the $30 increase and the return to the 40 hour week.

These agreements of August 31 and September 3rd which have been referred to were forwarded to me by the local committee membership.

Local B-963 is a local union located in Eau Claire. Its offices are in Eau Claire. The group in La Crosse is merely a branch of the union. It is not a separate independent local union located in La Crosse. I as the business manager of Local B-953 and the business manager for the group which is in La Crosse.

Exhibit #4 is a copy of the communication I received from the members of the Committee in the traffic division. It is dated August 31st.

[fol. 56] Exhibit #5 is a copy of the communication I received from the members of the committee in the plant department. It is dated September 3. On the second page of each of these exhibits there appears a notation "Approved by M. J. Boyle, Vice President, 6th District, IBEW" and also "Approved October 14, 1946, International Office, I. B. E. W., E. J. Brown, President." Those were not on the copies when I received them.

Exhibit 6 is a letter addressed by myself to M. J. Boyle. The original was signed by me. The letter refers to the fact that an original and five copies of the amended wage schedule are enclosed. That refers to Exhibit 4. The last exhibit is dated September 24. Under date of September 24 I sent the originals of exhibits 4 and 5 to Mr. Boyle. A copy of the letter of September 24 was sent to Mr. Samp. The enclosures referred to in this letter were the original and five copies of the amended wage schedule for the plant employees at La Crosse. That is Exhibit #5 dated September 3.

This letter of September 27 was sent two days after the meeting on September 25 after which the wage reopening date was approved. The reason why it was sent on the 27th when it was approved on the 25th was because of the trip to Eau Claire and then the actual typing of the copies of the original.

[fol. 57] Exhibit 8 is a letter addressed to myself informing me of the approval of the amended wage schedule. It is dated October 14. It is on the letterhead of the IBEW,

1200 15th Street N. W., Washington 5, D. C. It is addressed to Raymond A. Panzer, Business Manager, Local Union B-953, I. B. E. W., 17½ South Barstow Street, Eau Claire. It reads: "Dear Sir and Brother: We are herewith enclosing four copies each of the amendments to agreements now functioning between the La Crosse Telephone Corporation and Local Union B-953.

The amendments are dated respectfully September 3, 1946 and August 31, 1946. Your attention is called to the fact the copies enclosed contain only typed names of the signators to the agreement.

We are sure you will understand it is absolutely essential for this office to retain at least one originally signed copy of all documents to which International approval is appended.

In view of the fact you sent only one originally signed copy of amendments above identified, it has been necessary for us to retain them for I. O. P. files. With all good wishes, I am, sincerely yours, Ed. J. Brown, International President."

Attached to Exhibits 4 and 5 are the wage reopening clauses. As I testified on direct examination they were appended to the agreed-upon wage schedules after they had been approved.

[fol. 58] There is a difference in that the traffic department has the date May 1st and the plant department has the date March 1st. However, the agreement between me and the company was that the date of March 1st would apply to both traffic and plant.

With respect to sending these to the International office for approval the contracts are effective immediately upon agreement being reached with management and their effective date is not delayed until such time as their approval. They are subsequently reviewed by the International union. In the event the International has any objection to the agreement, the procedure is they will grant limited approval and point out those things that are desirable to change and ask us to make provision for such changes at the next reopening date. No effort is made to change the existing contract then. In my experience none of these agreements have ever been rejected by the International Union. Immediately upon agreement being concluded between the company and the union, both parties operate

under the agreement and enforce the agreement as of that date. • • •

In the event the Wisconsin Employment Relations Board did direct an election in this case it is the desire of our union to participate in such election in the plant and traffic departments that are combined as a unit in our present [fol. 59] agreement. We have not given too much consideration to whether we want them that way in an election or whether we want two separate units, one of the plant and one of the traffic.

If the board should determine an election to be conducted separately among the plant and traffic departments we desire to appear on the ballot for both. If the board should also conduct an election among office employees we do not desire to appear on that ballot.

Plant department employees are the maintenance and construction men, chiefly men employees. The traffic employees are chiefly girl operators—local and toll operators.

• • • I had a discussion with Mr. Samp with respect to the status of the agreement on wages. I believe that substantially it was to the effect that without a reopening clause they were not desirable. I stated to Mr. Samp I was not in agreement with the amendments or the agreements.

Chairman Gooding: Is there any dispute now about this situation: That Mr. Panzer prior to the meeting of September 23 objected to the amendment as it then stood and that amendment was turned down on September 23 by the employes. On September 25 another meeting was held of the Plant employes at which the amendment as then proposed was approved. Is there any dispute about that at all?

[fol. 60] Mr. Martin: No dispute on that.

• • • • • • •

Chairman Gooding: I understood your testimony that at the meeting of September 23 the agreement relating to the wage increase was rejected by the membership at the Plant meeting because of the fact that the re-opening clause was not satisfactory. Wasn't that your testimony?

A. Well, could we look back in the record?

Chairman Gooding: Well, is that the fact?

A. Well, if it is intended to be—well, substantially, yes.

38 39

Chairman Gooding: And isn't it a fact your minutes show that at that meeting the wage agreement proposed by the company and the committee—the local committee, was rejected because there wasn't a satisfactory re-opening clause?

A. Yes.

Chairman Gooding: And then at your meeting on September 25 the records show that the wage agreement was accepted at a meeting of the Plant group after several ballots?

A. That's right.

Chairman Gooding: And at the meeting of the 23rd you recommended against acceptance of it and——

A. Not because of the rates, merely because——

Chairman Gooding: Because of what?

A. The review date.

[fol. 61] E. B. Samp, having resumed the stand for further questioning, testified as follows:

Direct examination.

By Mr. Skemp:

Exhibit 9, is the list of the employees employed by the La Crosse Telephone Corporation as of September 30, 1946. It contains the various departments these employees are working in as of that date.

As vice president and general manager of the La Crosse Telephone Corporation I have the power to negotiate with the employees of my company and to bind the company by any contract I may enter. When I negotiated with the employees on September 3 and 4 and executed agreements relative to wage increases, I did so with the understanding I was binding the company—as of August 31st with the traffic department and September 4 with the plant department. In previous negotiations it has been customary to consider our agreements binding on the part of the company as of the date I signed the contract or document similar to those I signed on August 31, 1946 and September 4.

I have a concern with this jurisdictional fight that exists between these rival organizations. I do not feel there can be anything accomplished for the company or the employees through a jurisdictional fight; and we made definite and [fol. 62] firm agreements—there was a definite meeting of the minds at one time evidenced by the vote of employees

in their regular meeting for that purpose and the matter of the contract and the wages definitely considered closed. I cannot help but believe that sometime later on somebody came along and made some promises and started something that caused the dissension between the employees and we are in a very bad spot to operate anyway because of much dissension of the customers because of lack of facilities and all those things, and if we are going to have trouble and somebody creating trouble for us it is going to make it impossible where we are rendering service to approximately 15,000 subscribers and we cannot have anything that will cause dissension among the employees. We know from the time we negotiated the wage they were satisfied and it is certainly going to take the stand that we have a fully executed contract on September 4th and anything that transpired after that date was done under mutual agreement because the amendment was only executed on and worked on under mutual agreement which we have always done. After the contract is signed and an agreement reached, we have held with the employees and later on if they had an amendment or something that would improve working conditions, they should submit it and we would negotiate with them and amend it on re-opening the contract. [fol. 63] We have felt that we had a contract, the contract is extended to December first, 1947; that is the position we take.

The understanding has been there between the employer and the union that if there was something else that arose after December 1st we would still talk to the committee. We considered that an appendage or an agenda to the agreement.

Other than the reasons I have stated I feel it will destroy efficiency of operations. I have no reason to defend or offend the action of any union but I feel it is an inopportune time to create agitation that will cause dissension between the people. We have never had any trouble with the employees or the union. We have had a contract with the I. B. E. W. since 1937 and we have never had any particular dispute of any kind. I think the employees have every right to bargain under that contract—they are fully protected.

Outside of the fact we have had satisfactory relations we don't care which union it is. The relationships have been very satisfactory up to the present. • • •

Exhibit 3

(Amended Agreement Between the La Crosse Telephone Corporation and the International Brotherhood of Electrical Workers, Local No. B-953)

• • •

[fol. 64] This amended Agreement dated *1st* day of December, 1945, but actually fully consumated the *19th* day of *December*, 1945, and the provisions thereof when signed by the proper officers of the Company and the Local Union and approved by the President of the International Brotherhood of Electrical Workers becomes effective as of the *1st* day of *December*, 1945; for a period of one year, and shall continue in full force and effect from year to year thereafter, unless written notice is given by either party hereto to the other on or before ninety (90) days prior to the annual expiration date requesting that the agreement be amended or cancelled. If amendment is desired, the contents of the amendment shall be submitted by either party to the other on or before thirty (30) days prior to the termination date of any year in which said ninety (90) days notice has been given, however, changes mutually agreeable to the representatives of the parties hereto may be made at any time.

• • •

Exhibit 4

(Letter to Raymond A. Panzer dated August 31, 1946)

(Omitting formal parts)

In accordance with the provisions stipulated under Article 1, (method of negotiations) of the amended agreement between the La Crosse Telephone Corporation and the Inter-[fol. 65] national Brotherhood of Electrical Workers, Local No. B-953, the following listed committee representing the toll and local traffic department operating forces of the aforementioned union met with duly accredited representatives of the aforementioned corporation to discuss and negotiate wage scale increases for traffic personnel.

Committee: Rose Konop, Sigrid Braathen, Alice Olson, Annlouise Schmaltz.

• • • • • • •

These negotiations resulted in the following proposed additions, changes, and deletions to our present agreement and

were acceptable to both parties alike as evidence by the signatures of acceptance hereon.

Proposed Changes to Be Incorporated

Article V

"The following wage schedule to be made effective on September 1, 1946 and to continue in effect and in force until December 1, 1947."

Rate	Length of Service
$.62 per hour	0 through 6 months
.64 per hour	7 through 12 months
.67 per hour	13 through 24 months
.70 per hour	25 through 36 months
.72 per hour	37 through 48 months

[fol. 66]

.74 per hour	49 through 60 months
.77 per hour	After 60 months

• • • • • • •

"That the classification of Information Operator to be abolished and all personnel permanently assigned to performing such duties be classified as Junior Supervisor."

Senior Supervisor	$.10 in addition to base
Junior Supervisor	.05 in addition to base

• • • • • • •

"That the all night differential be changed to read—

All Night	Add 4 hrs. per week differential

• • • • • • •

It was clearly understood by the undersigned that the other provisions of the present agreement as it affects traffic personnel remains unchanged.

Very truly yours, s/ Annlouise Schmaltz, Shop Steward.

Accepted for the union, s/ Rose Konop.

Approved: By M. J. Boyle, Vice Pres., 6th Dist., IBEW, [fol. 67] (S.) Sigrid Braathen, Alice Olson, Annlouise Schmaltz.

Accepted for the company, (S.) E. B. Samp.

Exhibit 5

(Letter to Raymond A. Panzer dated September 3, 1946 from Pearl Pearson, Shop Steward)

(Omitting formal parts)

In accordance with the provisions stipulated under Article I, (method of negotiation), of the amended agreement between the La Crosse Telephone Corporation and the International Brotherhood of Electrical Workers, Local No. B-953, the following listed committee representing the plant department forces of the aforementioned union met with duly accredited representatives of the aforementioned corporation to discuss and negotiate wage scale increases for plant personnel.

Committee, Pearl Pearson, Philip Haag, Robert [fol. 68] Schultz, George Rief.

. . . . . .

These negotiations resulted in the following proposed additions, changes and deletions to our present agreement and were acceptable to both parties alike as evidenced by the signatures of acceptance hereon.

Proposed Changes to Be Incorporated

Article VI

It is understood that the wage schedule which is attached hereto and made a part of this letter is for a 40-hour week and that on September 1, 1946, the scheduled 44-hour week shall be discontinued.

The attached wage schedule to be made effective on September 1, 1946, and to continue in effect and in force until December 1, 1947.

. . . . . .

It was clearly understood by the undersigned that the other provisions of the present agreement as it affects plant personnel remains unchanged.

Very truly yours, Pearl Pearson, Shop Steward.

Accepted for the union, Pearl Pearson, Philip Haag, Rob- [fols. 69-70] ert Schultz, George Rief.

Accepted for the Company, E. B. Samp.

Approved: By M. J. Boyle, Vice President, 6th Dist., IBEW.

[fols. 71-72] IN SUPREME COURT OF WISCONSIN

Respondent's Appendix

[fol. 73] MOTION TO DISMISS APPEALS

[Caption omitted.]

Now comes the International Brotherhood of Electrical Workers, Local B-953, A. F. of L., by Padway, Goldberg & Previant, its attorneys, and upon the affidavit attached hereto, moves the Court to dismiss the Appeals in the above entitled cases because the question involved has become moot and a decision of the Court on the issues involved can have no practical effect nor be of any value to any of the parties hereto.

Dated, October 4, 1947.

Padway, Goldberg & Previant, Attorneys for International Brotherhood of Electrical Workers, Local B-953, A. F. of L.

[fol. 74] AFFIDAVIT OF DAVID PREVIANT

[Caption omitted.]

STATE OF WISCONSIN,
Milwaukee County, ss:

David Previant, first being duly sworn, on oath, deposes and says:

1. That he is one of the attorneys for the International Brotherhood of Electrical Workers, Local B-953, and makes this affidavit on its behalf being first duly authorized so to do. That this affidavit is in support of the Motion to Dismiss Appeal attached hereto, and that all matters hereinafter set forth are within his personal knowledge except as to those matters which are alleged on information and belief, and as to such matters affiant believes such facts to be true;

2. That after the certification of the Wisconsin Employment Relations Board which is the subject matter of this Appeal, the Telephone Guild of Wisconsin filed a complaint with the Wisconsin Employment Relations Board under date of March 7, 1947, in which it was charged and alleged that the Respondent, LaCrosse Telephone Corporation had

engaged in certain unfair labor practices in violation of the provisions of Chapter 111 of the Wisconsin Statutes, 1945, it being alleged, among other things, that the Company had failed to comply with the certification of the Wisconsin Employment Relations Board which is involved in [fol. 75] this appeal; that hearing was had on such complaint on April 22nd, 1947, but no decision was rendered thereunder by the Wisconsin Employment Relations Board pending receipt of the decision of the Circuit Court for LaCrosse County on the Petition for Review filed by the LaCrosse Telephone Corporation and by International Brotherhood of Electrical Workers Local B-953, A. F. of L., challenging the certification which is involved in this appeal, and that no further proceedings and no decision has as yet been rendered in such matter;

3. That in May, 1947, as affiant is informed and believes, the Telephone Guild of Wisconsin, after receipt of the decision and judgment appealed from herein, filed another Petition for Representation with the National Labor Relations Board at its Eighteenth Regional Office at Minneapolis, Minnesota, requesting such Board to hold an election in a unit described therein, which unit included classification of employees other than the units for which it was certified as a collective bargaining representative in an election conducted by the Wisconsin Employment Relations Board, and which is the subject of this appeal; that following the filing of such Petition, the National Labor Relations Board, through its agent, asserted jurisdiction in the matter and endeavored to persuade all parties concerned to agree to the holding of an election under the rules and regulations of the National Labor Relations Board, without hearing and without protest; that upon the failure of the parties to so agree the Regional Director of the [fol. 76] Eighteenth Region of the National Labor Relations Board recommended the dismissal of such Petition, and the Petition was thereafter dismissed;

4. That on June 8, 1947, the Telephone Guild of Wisconsin changed its name and affiliation and is now known as Communication Workers of America, Division No. 23, and there is, therefore, no longer in existence any labor union known under the name and style of Telephone Guild of Wisconsin, affiliated with the National Federation of Telephone Workers which is the name of the Union which

was certified as the exclusive bargaining representative in the proceedings before the Board which are now involved in this appeal;

5. That the aforesaid Communication Workers of America, Division No. 23, on August 4, 1947, filed a Petition for Certification of Representatives with the Eighteenth Region of the National Labor Relations Board located at Minneapolis, Minnesota, in which it asked to be designated as the bargaining agent for all employees of the LaCrosse Telephone Corporation excepting Executives and supervisory employees having the authority to hire, discharge, promote or discipline other employees or effectively recommend changes in the status of employees, which unit differs from that found appropriate by the Wisconsin Employment Relations Board in the instant case; that such Petition to the National Labor Relations Board was signed by Ray F. Dreyer as Secretary-Treasurer of the Communication Workers of America, Division No. 23, who is the same [fol. 77] Ray F. Dreyer who filed with the Wisconsin Employment Relations Board the Petition for Representation on behalf of the Telephone Guild of Wisconsin which gave rise to the proceedings herein involved;

6. That the contract involved in the instant proceedings has been in full force and effect since the date of its execution down to the present time and is subject to termination or modification commencing on December 1st, 1947, upon appropriate notice, and that under such contract the employees involved herein have received manifold benefits including wage increases granted subject to the wage reopening clause of such agreement in the early part of 1947;

7. That while the instant appeal was pending there has become effective what is commonly known as the Labor-Management Relations Act of 1947 (Public Law 101, 80th Congress), also known as the Taft-Hartley Act, under the terms and provisions of which the Wisconsin Employment Relations Board has no jurisdiction to conduct an election or to certify representatives as was done in the instant case.

David Previant.

Subscribed and sworn to before me this 4th day of October, A. D. 1947. June Donhauser, Notary Public, Milwaukee County, Wisconsin. My commission expires June 27, A. D. 1948.

[fol. 78] ARGUMENT IN SUPPORT OF MOTION TO DISMISS

A. The National Labor Relations Board Is Still Asserting Jurisdiction in This Matter

It appears from the affidavit, which has not been controverted, that another Petition was filed by the Telephone Guild with the National Labor Relations Board in May of 1947, in which the National Board was requested to hold an election in a unit which included classifications of employees other than the unit for which it was purportedly certified by the Wisconsin Board.

It further appears that in August, 1947, after the Telephone Guild of Wisconsin changed its name and affiliation, a Petition was again filed with the National Labor Relations Board which again asked that an election be conducted for certification as bargaining representative in a unit differing from that found appropriate by the Wisconsin Employment Relations Board in this case, and that such Petition is still pending before the Board.

All of this serves to underline the necessity for following a consistent rule of law with respect to jurisdiction of both the National Labor Relations Board and the Wisconsin Employment Relations Board as set forth in the Bethlehem case.

The contract involved in this case is subject to renewal or termination this year. The filing of the Petition with [fol. 79] the National Labor Relations Board in August, 1947, would undoubtedly eliminate any question arising with respect to application of the "contract-bar" rule. The only question involved would be that of unit. The determination by the National Labor Relations Board on the question of unit and an election conducted by the National Labor Relations Board would finally determine the issues involved and would result in the choice of a bargaining agent which choice would reflect the current desires of the employees and which bargaining agent could now negotiate a contract for the year 1948.

Under all of the circumstances surely the questions involved in this appeal are not only moot, but a decision in this case would be of no practical benefit or advantage to any of the parties, and would serve only to confuse the relationship existing, and place the employer and the labor unions involved in a position where they will not know

what their respective rights, duties and obligations are in the future.

B. The Union Certified by the Wisconsin Employment Relations Board Is No Longer in Existence

As pointed out in the affidavit, the Telephone Guild of Wisconsin which was purportedly certified as a bargaining agent in this case no longer has any existence under such name, and is now known as Communications Workers of America, Division No. 23.

[fol. 80] To reinstate a certification of a Union which has changed its name and affiliation would not lay to rest the questions involved in this case, and if such certification were to be amended would impose upon the employees a collective bargaining agent concerning which they had no opportunity to express their opinion.

The successor union has a Petition pending before the National Labor Relations Board. The processing of that Petition and further proceedings thereon should remain with the National Labor Relations Board uncomplicated by any determination of either the Wisconsin Employment Relations Board or this Court.

C. Significance of Passage of the Taft-Hartley Act While This Appeal Was Pending

The passage of the Taft-Hartley Act has made it impossible for the Wisconsin Employment Relations Board to require recognition of the bargaining agent which it has certified by further proceedings under the applicable unfair labor practice provisions of the Wisconsin Statutes. There is, therefore, no practical relief which can flow out of the present proceedings. (In connection with this Argument reference is made to the argument in the preceding brief.)

Conclusion

For all of the above reasons, It Is Respectfully Submitted that the question involved in this case has become moot, [fol. 81] and the decision of the Court on the issues involved can have no practical effect nor can be of any value to the parties hereto. The appeal, therefore, should be dismissed.

Respectfully submitted, Padway, Goldberg & Previant, Attorneys for Petitioner and Respondent, International Brotherhood of Electrical Workers, Local B-953, A. F. of L.

[fol. 82] [Caption omitted]

[fol. 83] In Circuit Court of La Crosse County

La Crosse Telephone Corporation, Plaintiff and Petitioner,

v.

Wisconsin Employment Relations Board, L. E. Gooding, Henry Rule and J. E. Fitzgibbons, Defendants and Respondents.

Notice of Appeal—Filed in Supreme Court June 9, 1947

To: Padway, Goldberg & Previant, 511 Warner Theatre Building, Milwaukee 3, Wisconsin, Attorneys for Int. Brotherhood of Elec. Workers, etc.

Hale, Skemp & Nietsch, 515 State Bank Bldg., La Crosse, Wisconsin, Attorneys for Petitioner.

Donald Martin, 4608 W. Crawford Ave., Milwaukee 14, Wisconsin. Attorney for Telephone Guild of Wisconsin.

Clerk of Circuit Court, La Crosse, Wisconsin.

Please take notice that the above named respondent, Wisconsin Employment Relations Board appeals to the Supreme Court of the State of Wisconsin from the judgment of the Circuit Court of La Crosse County, entered in the office of the clerk of said court on the 5th day of May, 1947 reversing and setting aside the certification of the Wisconsin Employment Relations Board entered January 14, 1947 and from the whole of such judgment.

Dated at Madison, Wisconsin, this 21st day of May, 1947.

John E. Martin, Attorney General; Stewart G. Honeck, Deputy Attorney General; Beatrice Lampert, Assistant Attorney General, Attorneys for Wisconsin Employment Relations Board.

[File endorsement omitted.]

[fol. 84] [Title omitted]

Admission of Service

Service of copy of notice of appeal to Supreme Court of Wisconsin Employment Relations Board in the above entitled matter is hereby admitted this 22nd day of May, 1947.

Padway, Goldberg & Previant.

[File endorsement omitted.]

[fol. 85] [Title omitted]

ADMISSION OF SERVICE

Service of copy of notice of appeal to Supreme Court of Wisconsin Employment Relations Board in the above entitled matter is hereby admitted this 21 day of May, 1947.

Hale, Skemp & Nietsch.

[File endorsement omitted.]

[fol. 86] [Title omitted]

ADMISSION OF SERVICE

Service of copy of notice of appeal to Supreme Court of Wisconsin Employment Relations Board in the above entitled matter is hereby admitted this 27th day of May, 1947.

Donald J. Martin.

[File endorsement omitted.]

[fol. 87] [Title omitted]

ADMISSION OF SERVICE

Service of copy of notice of appeal to Supreme Court of Wisconsin Employment Relations Board in the above entitled matter is hereby admitted this 22nd day of May, 1947.

L. G. Schaefer.

[File endorsement omitted.]

[fol. 88] IN CIRCUIT COURT OF LA CROSSE COUNTY

INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, LOCAL B-953, A. F. OF L., Petitioner,

v.

WISCONSIN EMPLOYMENT RELATIONS BOARD, L. E. GOODING, Henry Rule and J. E. Fitzgibbon, as Members of the Wisconsin Employment Relations Board, Respondents.

NOTICE OF APPEAL—Filed in Supreme Court June 9, 1947

To: Padway, Goldberg & Previant, 511 Warner Theatre Building, Milwaukee 3, Wisconsin, Attorneys for Petitioner. Hale, Skemp & Nietsch, 515 State Bank Bldg., La Crosse, Wisconsin, Attorneys for La Crosse Telephone Co.

Donald Martin, 4608 W. Crawford Ave., Milwaukee 14, Wisconsin. Attorney for Telephone Guild of Wisconsin. Clerk of Circuit Court, La Crosse, Wisconsin.

Please take notice that the above named respondent, Wisconsin Employment Relations Board appeals from the judgment of the Circuit Court of La Crosse County, entered in the office of the clerk of said court on the 9th day of May, 1947 reversing and setting aside the certification of the Wisconsin Employment Relations Board entered January 14, 1947 and from the whole of such judgment.

Dated at Madison, Wisconsin, this 17th day of May, 1947.

John E. Martin, Attorney General; Stewart G. Honeck, Deputy Attorney General; Beatrice Lampert, Assistant Attorney General.

[File endorsement omitted.]

[fol. 89] [Title omitted]

ADMISSION OF SERVICE

Service of copy of notice of appeal of Wisconsin Employment Relations Board in the above entitled matter is hereby admitted this 19th day of May, 1947.

Padway, Goldberg & Previant.

[File endorsement omitted.]

[fol. 90] [Title omitted]

ADMISSION OF SERVICE

Service of copy of notice of appeal of Wisconsin Employment Relations Board in the above entitled matter is hereby admitted this 19 day of May, 1947.

Hale, Skemp & Nietsch.

[File endorsement omitted.]

[fol. 91] [Title omitted]

ADMISSION OF SERVICE

Service of copy of notice of appeal of Wisconsin Employment Relations Board in the above entitled matter is hereby admitted this 21st day of May, 1947.

Donald J. Martin.

[File endorsement omitted.]

[fols. 92-93] [Title omitted]

ADMISSION OF SERVICE

Service of copy of notice of appeal of Wisconsin Employment Relations Board in the above entitled matter is hereby admitted this 19th day of May, 1947.

L. G. Schaefer, Clerk of Circuit Court.

[File endorsement omitted.]

[fol. 94] [File endorsement omitted]

IN SUPREME COURT OF WISCONSIN

Nos. 60 & 61

[Titles omitted]

STIPULATION TO CONSOLIDATE—Filed September 2, 1947

Whereas the above entitled appeals involve an identical certification of representatives made by the Wisconsin Employment Relations Board pursuant to sec. 111.05 of the statutes, and

Whereas said appeals involve identical issues of law, Now, Therefore,

It Is Stipulated by and between the parties, subject to the approval of the court, through their respective attorneys that said appeals may be consolidated and treated [fol. 95] as a single case before the Supreme Court for purposes of briefing, argument, consideration and decision.

Dated at Madison, Wisconsin, this 2nd day of September, 1947.

Beatrice Lampert, Attorney for the Appellant, Wisconsin Employment Relations Board; Hale Skemp & Nietsch, Attorney for the respondent, La Crosse Telephone Corporation; Padway, Goldberg & Previant, Attorney for the respondent, International Brotherhood of Electrical Workers, Local B-953, A. F. of L.; Donald J. Martin, Attorney for the respondent, Telephone Guild of Wisconsin.

[fols. 96-97] In Supreme Court of Wisconsin

[Titles omitted]

Minute Entry—November 18, 1947

And now at this day came the parties herein, by their attorneys, and these causes having been argued by Beatrice Lampert, Assistant Attorney General, for the said appellants, by Donald J. Martin, Esq., for the said Communications Workers of America, by David Previant, Esq., for the said respondent International Brotherhood of Electrical Workers, and by Thomas S. Skemp, Esq., for the respondent La Crosse Telephone Corporation, and submitted, and the court not being now sufficiently advised of and concerning its decision herein, took time to consider of its opinion.

[fol. 98] [File endorsement omitted]

In Supreme Court of Wisconsin

August Term 1947. Nos. 60, 61

No. 60

La Crosse Telephone Corporation, Respondent,

vs.

Wisconsin Employment Relations Board, et al., Appellants

No. 61

International Brotherhood of Electrical Workers, Local B-953, A. F. of L., Respondent,

vs.

Wisconsin Employment Relations Board, et al., Appellants

Appeals from judgments of the circuit court for La Crosse county. R. S. Cowie, circuit judge. *Reversed.*

Separate actions were brought in the circuit court by petitions of the La Crosse Telephone Corporation and the International Brotherhood of Electrical Workers, Local B-953, A. F. of L., respectively, for the review, under sec. 111.07 (8), Stats., of a certification made by the Wisconsin

Employment Relations Board of the election of the Telephone Guild of Wisconsin as the bargaining representative for certain employees of the Telephone Corporation. The circuit court reversed and set aside the certification, and from judgments entered accordingly the Wisconsin Employment Relations Board appeal.

OPINION—Filed December 23, 1947

[fol. 99] FRITZ, J.

The certification made by the Wisconsin Employment Relations Board (hereinafter called State Board) of the election of the Telephone Guild of Wisconsin (herein called Guild) as the bargaining representative for certain employees of the La Crosse Telephone Corporation (herein called Employer) was reversed and set aside by the circuit court on the grounds that the Employer is engaged in interstate commerce, and that the decision in *Bethlehem Steel Company v. New York State Labor Relations Board*, 330 U. S. 767, 67 Sup. Ct. 1026, 91 L. ed. 1054, leaves no constitutional authority in the State Board to determine collective bargaining units and conduct collective bargaining elections among employees or employers engaged in such commerce.

The principal issue on this appeal is, as stated in the State Board's brief,—

"Does the National Labor Relations Act preclude the Wisconsin Employment Relations Board from conducting an election to determine the desires of employees of the local (La Crosse) telephone corporation with respect to a collective bargaining representative, irrespective of whether the National Labor Relations Board has ever taken any action involving the company and its employees, and irrespective of whether the action of the state board contravenes any substantive provisions of the national act or any fixed policy of the national board?"

The Employer is a Wisconsin corporation and all its employees are employed in La Crosse county in this state in its operation of a local telephone service within the La Crosse area, and rendering in connection therewith such intrastate and interstate long distance service as is incidental thereto. In and for some time prior to December 1945, the employees in its *traffic* and its *plant* departments (which included all excepting its office workers) were repre-

sented for collective bargaining purposes by the International Brotherhood of Electrical Workers, Local B-953, A. F. of L. (herein called Local B-953). On December 19, [fol. 100] 1945, Local B-953 and the Employer entered into a collective bargaining agreement which was to continue in effect until December 1, 1946, and from year to year thereafter unless either party should give written notice ninety days prior to the annual expiration date requesting that the agreement be amended or cancelled, and if an amendment was desired the contents thereof should be submitted by such party to the other on or before thirty days prior to the termination date of any year in which the ninety day notice was given, but that changes mutually agreeable may be made at any time; and in said agreement a method of negotiation for the settlement of differences was also provided under which the Employer and Local B-953 agreed to meet and deal with each other through their duly accredited officers and committees. Local B-953 in a letter dated August 28, 1946, and addressed to E. B. Samp, Employer's vice president and manager, stated that, "To meet the notice requirements of our agreement, we wish to notify you we desire to amend the agreement." Pursuant thereto negotiations concerning a new wage schedule were commenced between Samp and a committee of the traffic department employees on August 31, 1946, and were likewise commenced between Samp and a plant department committee on September 3, 1946. Wage schedules for each department were agreed upon in those negotiations and were incorporated in a letter signed by Samp and by members of Local B-953 committees and addressed to Raymond A. Panzer at Eau Claire, who was business manager of Local B-953. In the letter in relation to the plant department employees it was stated,—

"These negotiations resulted in the following proposed additions, changes and deletions to our present agreement and were acceptable to both parties alike as evidenced by the signatures of acceptance hereon. * * * It was clearly understood by the undersigned that the other provisions of the present agreement as it affects traffic personnel remain unchanged."

[fol. 101] However, in addition, representatives of Local B-953, and the Employer's officials on September 19 or 20, 1946, began negotiations for a provision which also was to

be incorporated in each of the proposed contracts respecting the date when it might be opened for new wage negotiations; and at a meeting of Local B-953 on September 23, the proposed wage schedule amendments negotiated by its committees were rejected by it on the recommendation of its business manager because of the lack of a satisfactory reopening clause as to when the wage agreements could be modified under such a clause. Subsequently said business manager and Employer's officials tentatively agreed upon a date when the contract might be so reopened but, instead of accepting that date the members of Local B-953 on September 25, 1946, finally voted in favor of another date, March 1, as the reopening date. The Employer was informed of Local B-953's ratification of this amendment by a letter mailed from Eau Claire on September 27, and provisions respecting said reopening date were subsequently added to the above stated letters containing the proposed wage schedules, and thereafter a new contract was drafted for the year beginning December 1, 1946. But it had not been signed by the Employer's officials and the officials of Local B-953 when, on October 18, 1946, the State Board conducted a hearing in proceedings which resulted ultimately in the election and certification of the Guild as the bargaining representative of the plant and traffic departments' employees of the Employer.

Meanwhile, during the period of the above stated negotiations the Guild, on September 20, 1946, filed with the National Labor Relations Board (herein called the National Board) a petition to have the Guild certified as the bargaining representative of the Employer's employees, who were theretofore represented by Local B-953; and the Employer [fol. 102] was notified by a letter from the National Board's office in Minneapolis, dated September 24, 1946, of the filing of the Guild's petition. But there is nothing in the record herein to indicate that the National Board ever took jurisdiction of or pursuant to said petition; and on October 8, 1946, the Guild filed with the National Board a request to approve the withdrawal thereof. Then on that date the Guild filed with the State Board a petition for the holding of an election by all of the Employer's employees to determine what if any representation they desired for the purpose of collective bargaining. Pursuant to this petition the State Board conducted a hearing on October 18, 1946, and on November 27, 1946, filed its decision determining,—

in connection with finding the facts stated above as to the negotiations in 1946 between the Employer and Local B-953, and its rejection of the proposed amendments to the collective bargaining contract because there was no provision therein specifying the reopening date for reviewing the wage question, and there was no determination by Local B-953 as to such date until at the meeting of its members on September 25, as to which the Employer was notified on September 26 or 27,—that until the Employer was given such notice,—"no binding agreement had been entered into between the Employer and the union"; and that "There was, therefore, no binding agreement when the company was notified that another union claimed to represent a majority of the employees that the E. B. E. W. proposed to represent, and a contract entered into subsequent to the receipt of such notice cannot operate as a bar to an election."

Upon the matters thus determined, the State Board directed the conduct of the election in question. In its direction the Board gave the employees in each department (i. e., the plant, traffic and likewise the office departments) [fol. 103] the opportunity to determine whether or not they desire to constitute themselves separate units; and directed that for the voting by the plant and traffic departments employees both the Guild and Local B-953 shall appear on the ballot, while for the office employees,—because of the fact that Local B-953 does not desire to represent them,—the only question submitted would be whether they desired to be represented by the Guild or not. At the election conducted by the State Board on November 27, 1946, the majority of the plant and traffic departments workers voted to constitute a single bargaining unit, which is the same group of employees which Local B-953 was bargaining for in the past and desired to continue to represent. By those employees, 91 votes were cast for the Guild, and 14 in favor of Local B-953, as their representative. The office employees voted not to be included in the same bargaining unit as the other departments and not to be represented by any union. Pursuant to that election, the State Board on January 14, 1947, certified that the Guild was elected by the employees of the Employer (excepting its executive, supervisory and office employees) as their bargaining representative; and this certification Local B-953 and likewise

the Employer petitioned to have reversed and set aside by the circuit court.

There is nothing in the record of the proceedings before the State Board or in the circuit court to indicate that the National Board has ever in any manner exercised any of its powers or discretion or otherwise taken jurisdiction of any question or phase of the Employer's or its employees' industrial relations. Although a petition that the Guild be certified as the bargaining representative of the Employer's employees had been filed by the Guild with the National Board on September 20, 1946, that Board apparently never [fol. 104] took jurisdiction pursuant thereto, and the petition was withdrawn at the request of the Guild before it filed, on October 8, 1946, its petition with the State Board for the latter's direction to conduct and hold such an election.*

In *International B. of E. W. v. Wisconsin E. R. Board*, 245 Wis. 532, 15 N. W. (2) 823, we pointed out, in line with the federal courts' rulings, that the National Board is not required to accept jurisdiction or exercise its powers on every petition or complaint filed with it. As we stated in that case,—

(p. 539) "When the National Labor Relations Board has acted in a particular case, the question of whether there is a conflict between the two jurisdictions is to be determined of course by the provisions of these acts. * * * If no proceeding is had under the National Labor Relations Act, no conflict of jurisdiction can arise. This matter was fully discussed in the Rueping L. Co. Case already referred to. *The National Labor Relations Board having never taken jurisdiction to certify the name of a bargaining agent, the state board could entertain proceedings relating to violations of state law. In so doing there was under such circumstance no conflict of jurisdiction.* Not every labor dis-

* Apparently (as is stated in an affidavit filed by counsel for Local B-953 on its motion to dismiss these appeals on the ground that the question involved therein has become moot) the Guild in May 1947 filed another petition with the National Board requesting said Board to hold an election to determine a bargaining representative for the Employer's employees, and that petition was dismissed on the recommendation of the Board's regional director.

pute arises to such dignity that it impedes and obstructs interstate commerce although the employer may be engaged in what has been defined as interstate commerce."

In *Public S. E. Union* v. *Wisconsin E. R. Board*, 246 Wis. 190, 194, 16 N. W. (2) 823, we said,—

"The appellants contend—(1) That the board had no jurisdiction to issue an order restraining the president of the union from acting or attempting to act as a representative in any capacity for the employees of the company; suspending the right of the union to act as a collective bargaining representative or as a representative in any capacity for the employees of the company and suspending the right of the officers of the union to serve as a representative in any capacity of the employees of the company. • • • We have considered the matter of conflict between Wisconsin and federal law in a number of other cases and have held that where the National Labor Relations Board has not taken jurisdiction in the controversy, no conflict exists."

[fol. 105] See also *Allen-Bradley Local 1111* v. *Wisconsin E. R. Board*, 315 U. S. 740, 86 L. ed. 1154 (237 Wis. 164, 295 N. W. 791).

And there is nothing stated in our decision in *International Union* v. *Wisconsin E. R. Board*, 250 Wis. 550, 27 N. W. (2) 875, which should be deemed to warrant concluding that the State Board's action in ordering the conduct and certifying the result of the election in question herein was not acting within its jurisdiction and powers. As we stated then, in duly applying and giving effect to the decision in *Bethlehem Steel Co.* v. *New York State Labor Relations Board, supra*—(p. 567)

"What the court held was that the National Labor Relations Board had exercised the jurisdiction delegated to it under the federal act by declining to designate the foremen as a bargaining unit. The declination was an exercise of its jurisdiction, just as much as granting it would have been. The jurisdiction vested in the National Labor Relations Board was to determine whether it would designate the foreman as a bargaining unit, and it exercised jurisdiction when it denied the application. No such situation exists in the instant case as was involved in the Bethlehem Steel Co.

Case, supra. In the first place, no application has been made to the National Labor Relations Board to exercise any jurisdiction of the labor dispute here involved. *The National Labor Relations Board not having exercised any jurisdiction* of such labor dispute *the state board may exercise jurisdiction* of it. *No conflict is here involved.* There was a direct conflict in the Bethlehem Steel Co. Case. The National Labor Relations Board had determined that foremen could not form a unit for collective bargaining and the state board said that they could and formed a unit. The National Labor Relations Board's decision barred the state board from taking any action at all."

The State Board's action, which is under consideration on these appeals, does not involve the exercise of its discretion nor the formulation of any policy which does or could vary from those of the National Labor Relations Act. The mere fact-finding procedure of the State Board in the ascertainment of the facts, and its thereupon ordering and conducting an election and certifying the result thereof, constitutes action in merely its ministerial capacity (*United R. & W. D. S. E. of A.* v. *Wisconsin E. R. Board*, 245 Wis. 636, 641, 15 N. W. (2) 844; *J. F. Quest Foundry Co.* [fol. 106] v. *International M. & F. W. Union*, 216 Minn. 436, 441, 13 N. W. (2) 32; *National Labor Relations Board* v. *Botany Worsted Mills*, 133 Fed. (2) 876, 882); and does not deny to the National Board or interfere with its right to exercise its discretion and powers if it should ever conclude to exercise its jurisdiction and powers in that respect to determine the appropriate bargaining representative or unit of representation. But, although the National Board's power over that subject is paramount, it is not exclusive in such a case as we have here, until the federal power is exercised or jurisdiction thereto is taken as to particular employees.

There cannot be sustained the contention of the Employer and Local B-953 that the State Board erred in determining that no new binding contract had been finally entered into between them in 1946 prior to the Employer's receiving notice that another union claimed to represent a majority of the employees whom Local B-953 had been representing. Although in the course of the negotiations between Samp and committees of employees in the traffic and also the plant departments they had come to agree, by September

19 or 20, as to the wage schedules and working hours, no new contract had been completely written or signed by the Employer and by Local B-953, as the bargaining agent, because, as stated above, they had not been able, in their negotiations, to agree upon the date at which the proposed contract might be reopened for new wage negotiations. After the amended wage schedule and working hours, which had been negotiated by Samp and the employee committees, were rejected by the employees' action at their Local B-953's meeting on September 23, because of the lack of a mutually satisfactory reopening provision, the Employer was not informed until by a letter mailed from Eau Claire on September 27, that the union membership finally voted to set March 1 as the date on which negotiations as to [fol. 107] wages might be reopened. But a new contract for the year beginning December 1, 1946, was not drafted until some time after September 27, 1946, and apparently no such contract had been executed by the officials of Local B-953 or the Employer when, on October 8, 1946, the Guild filed its petition with the State Board for an election of the employees to determine what collective bargaining representation they desired, or even when the Board filed its direction for the holding of such election.

Neither can there be sustained the Employer's and Local B-953's contention that the results of the balloting at the election did not provide sufficient basis for the State Board's certification that the Guild had been selected as the majority representative of the employees in the traffic and the plant departments, and that the Guild's petition be dismissed in so far as it related to the office employees. As claimed by the State Board, the results of the votes cast appear to be to the following effect. Of the 114 employees in the traffic department who were eligible to vote, 52 voted against having the employees of that department bargaining collectively as a separate unit, and 13 in favor thereof; and 64 voted for the Guild and 1 for Local B-953 as their bargaining representative. Of 40 employees in the plant department eligible to vote, 25 voted against a separate bargaining unit, and 12 in favor thereof; and 27 voted for the Guild and 13 for Local B-953 as their representative. Consequently of the 145 employees who voted that they desired to bargain together, 91 desired to be represented by the Guild, and 14 by Local B-953. Of 31 office employees

eligible to vote, 10 voted in favor of a separate unit, and 18 voted against it or having any collective bargaining representation. The vote as to whether the employees of the [fol. 108] traffic department desired to bargain as a separate unit, and as to whether the employees of the plant department desired to bargain as a separate unit was decidedly against each of these departments bargaining as a separate unit. The alternative thereto was not necessarily a unit which would include office employees. No question submitted to the employees on their ballots was contingent upon the result of any other, either in wording or in spirit. The votes of the employees in the traffic and plant departments as to who should constitute their representative for collective bargaining purposes were unconditional; and of the 105 employees in those departments who voted that they desired to bargain as a unit, 91 voted unconditionally to be represented by the Guild. The State Board had published advance notices of the election with sample ballots, but neither Local B-953 nor any other party made any request of the Board prior to the election that it be conducted in a different manner. If there were any objection to the manner in which the Board proposed to hold the election, the objection should have been submitted to the Board, and as none was so submitted, it cannot be raised for the first time upon review in court. As is provided in sec. 111.07 (7), Stats., —:

"No objection that has not been urged before the board shall be considered by the court unless the failure or neglect to urge such objection shall be excused because of extraordinary circumstances."

It follows that the judgments under review must be reversed and the causes remanded with directions to enter judgments sustaining the State Board's direction of the election and its certification of the results thereof.

By the Court: Judgments reversed in each case, and causes remanded with directions to enter judgments in accordance with this opinion.

[fol. 109] IN SUPREME COURT OF WISCONSIN

LA CROSSE TELEPHONE CORPORATION, Respondent,

vs.

WISCONSIN EMPLOYMENT RELATIONS BOARD, L. E. GOODING, HENRY RULE and J. E. FITZGIBBON, Appellants.

LaCrosse Circuit Court. Opinion by Justice Fritz

JUDGMENT—December 23, 1947

This cause came on to be heard on appeal from the judgment of the Circuit Court of La Crosse County and was argued by counsel. On consideration whereof, it is now here ordered and adjudged by this Court, that the judgment of the Circuit Court of La Crosse County, in this cause, be, and the same is hereby, reversed.

And that this cause be, and the same is hereby, remanded to the said Circuit Court with directions to enter judgment in accordance with the opinion.

Justice Fowler took no part.

[fol. 110] IN SUPREME COURT OF WISCONSIN

INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, LOCAL B-953, A. F. OF L., Respondent,

vs.

WISCONSIN EMPLOYMENT RELATIONS BOARD, L. E. GOODING, Henry Rule and J. E. Fitzgiboon, as Members of the Wisconsin Employment Relations Board, Appellants.

LaCrosse Circuit Court. Opinion by Justice Fritz

JUDGMENT—December 23, 1947

This cause came on to be heard on appeal from the judgment of the Circuit Court of La Crosse County and was argued by counsel. On consideration whereof, it is now here ordered and adjudged by this Court, that the judgment of the Circuit Court of La Crosse County, in this cause, be, and the same is hereby, reversed.

And that this cause be, and the same is hereby, remanded to the said Circuit Court with directions to enter judgment in accordance with the opinion.

Justice Fowler took no part.

[fol. 111] [File endorsement omitted]

IN SUPREME COURT OF WISCONSIN

No. 60 and 61

[Titles omitted]

PETITION FOR APPEAL TO THE SUPREME COURT OF THE UNITED STATES—Filed February 25, 1948

To the Honorable Marvin B. Rosenberry, Chief Justice of the Supreme Court of Wisconsin:

The LaCrosse Telephone Corporation, Petitioner and Respondent, feeling itself aggrieved by the decree rendered and entered in the above entitled cause on the 23rd day of December, 1946, hereby appeals from the said decree to the Supreme Court of the United States for the reasons set forth in the assignment of errors filed herein, and prays that its appeal be allowed, and that citation be issued as provided by law, and that a transcript of the record, proceedings, and documents upon which said decree was based, duly authenticated, be sent to the Supreme Court of the United States under the rules of such court in such cases made and provided.

[fol. 112] And your petitioner further prays that the proper order relating to the required security to be required of it be made.

T. H. Skemp, I. H. Ile, Attorneys for Petitioner, LaCrosse Telephone Corporation, 515 State Bank Building, LaCrosse, Wisconsin.

[fol. 113] [File endorsement omitted]

IN SUPREME COURT OF WISCONSIN

No. 60 and 61

[Titles omitted]

ASSIGNMENT OF ERRORS—Filed February 25, 1948

The LaCrosse Telephone Corporation, petitioner and respondent above named, files the following assignment of errors upon which it will rely in the prosecution of the Appeal to the Supreme Court of the United States from the decree of the Supreme Court of the State of Wisconsin entered on the 23rd day of December, 1947:

1. The Supreme Court of Wisconsin erred in reversing and setting aside the decision of the Circuit Court for La Crosse County, Wisconsin, made and entered in this cause on May 5, 1947, and adjudging that a certification made by the Wisconsin Employment Relations Board of the election of the Telephone Guild of Wisconsin as a bargaining representative for employes of the Telephone Corporation was valid and within the jurisdiction of the Wisconsin Employment Relations Board under the Wisconsin Employment Peace Act.

[fol. 114] 2. The Supreme Court of Wisconsin erred in holding that under the provisions of Section 8 of Article I and Paragraph Two of Article VI of the Constitution of the United States, the Wisconsin Employment Peace Act can legally be applied to the issue of determining the bargaining representative for employees where the employer is engaged in interstate commerce;

3. The Supreme Court of the State of Wisconsin erred in holding that under the provisions of Section 8 Article I and Paragraph Two of Article VI of the Constitution of the United States, the Wisconsin Employment Relations Board has jurisdiction to determine the contract rights of employer and employee where the employer is engaged in interstate commerce.

4. The Supreme Court of Wisconsin erred in not applying the decision of the Supreme Court of the United States in the case of the Bethlehem Steel Company et al. vs. New

York State Labor Relations Board and Allegheny Ludlum Steel Corporation vs. William J. Kelly et al., 330 U. S. 767, 67 Sup. Ct. 1026, 91 L. Ed 1054.

5. The Supreme Court of Wisconsin erred in holding that the Wisconsin Employment Relations Board has jurisdiction over employer-employee relations of the LaCrosse Telephone Corporation arising out of the question of choice of units of representation for bargaining purposes, irrespective of whether the National Labor Relations Board has ever taken any action involving the company and its employes, and irrespective of whether the action of the State Board contravenes any substantive provisions of the National Act or any fixed policy of the National Board.

Wherefore the LaCrosse Telephone Corporation, respondent above named, prays that the said decree be reversed, and for such other and further relief as to the court may seem just and proper.

Dated this 25 day of February, 1948.

T. H. Skemp, I. H. Hale, Attorneys for Respondent, LaCrosse Telephone Corporation, 515 State Bank Building, LaCrosse, Wisconsin.

[fol. 115] [File endorsement omitted]

IN SUPREME COURT OF WISCONSIN

No. 60 and 61

[Titles omitted]

ORDER ALLOWING APPEAL—Filed February 25, 1948

The La Crosse Telephone Corporation, petitioner and respondent, herein, having filed a petition for appeal to the Supreme Court of the United States from the judgment entered herein on the 23rd day of December, 1947, and having filed its assignment of errors,

Wherefore, it is ordered:

1. That the appeal herein to the Supreme Court of the United States be and it is hereby allowed;

2. That the bond as filed is sufficient for such appeal from this court and the rules of the Supreme Court of the United States.

Dated this 25 day of February, 1948.

By the Court, Marion B. Rosenberry, Chief Justice.

[fol. 116] [File endorsement omitted]

IN SUPREME COURT OF WISCONSIN

No. 60 and 61

[Titles omitted]

STIPULATION AS TO APPEAL BOND—Filed February 25, 1948

Whereas the parties hereto have stipulated that there be one record on the appeal of the above actions to the Supreme Court of the United States and that the appeals in said actions may be consolidated and treated as a single case before the Supreme Court of the United States for the purposes of briefing, argument, consideration and decision, and

Whereas said appeals do not involve money or property judgments but the validity of a ministerial function by a state board,

Wherefore, it is stipulated as follows:

1. That there be no supersedeas bond in either of said actions;

• • • • • • •

3. That the Chief Justice of the Supreme Court of the [fol. 117] State of Wisconsin allow such appeal, enter an order of such allowance, and certify that satisfactory security for said costs have been provided.

Dated this 25 day of February, 1948.

John E. Martin, Attorney General of the State of Wisconsin; Stewart G. Honeck, Deputy Attorney General; Beatrice Lampert, Assistant Attorney General; T. H. Skemp, I. H. Hale, Attorneys for LaCrosse Telephone Corp., Petitioner and Respondent, 515 State Bank Building, LaCrosse, Wisconsin; Louis Sherman, General Counsel of IBEW, Pet. and Res., 1200 15th Street N.W., Washington, 5, D. C.

[fols. 118-119] Bond on appeal for $500.00 approved and filed Feb. 25, 1948, omitted in printing.

[fols. 120-121] Citation in usual form showing service on John E. Martin, filed Feb. 25, 1948, omitted in printing.

[fol. 122] [File endorsement omitted]

IN THE SUPREME COURT OF WISCONSIN

Nos. 60 and 61

[Titles omitted]

PETITION FOR APPEAL, ASSIGNMENT OF ERRORS AND PRAYER FOR REVERSAL—Filed February 25, 1948

To the Honorable Marvin B. Rosenberry, Chief Justice of the Supreme Court of Wisconsin:

Your Petitioner, Local Union No. 953, of the International Brotherhood of Electrical Workers (A. F. of L.), Respondent in the above entitled cause (hereinafter called the Petitioner) respectfully shows by this petition, and the Assignment of Errors filed herewith, that in the records, proceedings and decision of this Court in the above entitled cause, this Court being the highest Court of the State of Wiscon-

sin in which a decision could be had in said cause, and said decision being a final judgment, manifest error has occurred, greatly to the damage of Petitioner, in that, as appears in said record and proceedings, there was drawn in question the validify of a statute of the State of Wisconsin on the ground of its being repugnant to the Constitution or laws of the United States, and the final judgment of this Court is in favor of the validity of said statute, which statute is the Wisconsin Employment Peace Act, Chapter 111, Subchapter I of the Wisconsin Statutes, as amended, Sec. 111.01 to 111.19.

Wherefore, your Petitioner respectfully prays that it be permitted to take an appeal to the Supreme Court of the United States from the final judgment of this Court, made and entered in the above entitled cause on December 23, 1947 for the reasons specified in the Assignment of Errors accompanying this petition, that a proper order be made with regard to the appeal bond to be given by the Petitioner, [fol. 123] that a citation issue as provided by law, and that the material part of the record, proceedings and papers upon which said final judgment was based, duly authenticated, be sent to the Supreme Court of the United States in accordance with the rules in such case made and provided.

Assignment of Errors

Your Petitioner complains that the Supreme Court of Wisconsin committed manifest error to the prejudice of your Petitioner in the above entitled cause and assigns the following errors in the record and proceedings herein upon which it will rely in its appeal to the Supreme Court of the United States (each numbered paragraph being a separate assignment of error.

I. The Supreme Court of Wisconsin erred in rejecting the contention of your Petitioner that the question or controversy over which the Wisconsin Employment Relations Board sought to assert jurisdiction under the Wisconsin Employment Peace Act in the proceeding before said Board in which was issued the certification of a bargaining representative is a question or controversy exclusively within the jurisdiction of the National Labor Relations Board under the National Labor Relations Act and is not within the jurisdiction of the Wis-

consin Employment Relations Board under the Wisconsin Employment Peace Act.

II. The Supreme Court of Wisconsin erred in failing and refusing to hold that under the provisions of section 8 of Article I and clause 2 of Article VI of the Constitution of the United States the Wisconsin Employment Peace Act cannot have any lawful application to the aforesaid question or controversy.

III. The Supreme Court of Wisconsin erred in failing and refusing to follow the applicable decision of the Supreme Court of the United States in the case of *Bethlehem Steel Company, et al. vs. New York State Labor Relations Board and Allegheny Ludlum Steel Corporation v. William J. Kelly, et al.*, 330 U. S. 767, 67 Sup. Ct. 1026, 91 L. Ed. 1054.

[fol. 124] IV. The Supreme Court of Wisconsin erred in reversing the order of the Circuit Court for La Crosse County which was made and entered in this cause on May 7th, 1947.

V. The Supreme Court of Wisconsin erred in failing and refusing to affirm said order of the Circuit Court of La Crosse County reversing and setting aside the certification of a bargaining representative issued by the Wisconsin Employment Relations Board.

PRAYER FOR REVERSAL.

Wherefore, your Petitioner prays that the aforesaid final Judgment of this Court, made and entered on December 23, 1947 in the above entitled cause, be reversed and a judgment rendered in favor of your Petitioner, with costs, and for such other and further relief as to this Court may seem just and proper.

Louis Sherman, General Counsel of the International Brotherhood of Electrical Workers, 1200 Fifteenth Street, N.W., Washington 5, D. C., Attorney for Respondent.

[fol. 125] [File endorsement omitted]

IN THE SUPREME COURT OF WISCONSIN

Nos. 60 and 61

[Titles omitted]

ORDER ALLOWING APPEAL—Filed February 25, 1948

International Brotherhood of Electrical Workers, Local B-953, A. F. of L., Petitioner—Respondent in the above entitled case, having filed its Petition for appeal, praying that it be permitted to take an appeal to the Supreme Court of the United States from the final judgment of this Court, made and entered in said cause on December 23, 1947; and having also made and filed with said Petition its Assignment of Errors, Prayer for Reversal, and its Statement as to Jurisdiction, it is hereby

Ordered that said appeal be, and the same hereby is, allowed as prayed for, and that an appeal bond in the sum of $500.00 be filed by or in behalf of said Petitioner—Respondent; with good and sufficient surety.

Marvin B. Rosenberry, Chief Justice of the Supreme Court of Wisconsin.

Date: February 25th, 1948.

[fol. 126] [File endorsement omitted]

IN SUPREME COURT OF WISCONSIN

Nos. 60 and 61

[Titles omitted]

STIPULATION AS TO APPEAL BOND—Filed February 25, 1948

Whereas the parties hereto have stipulated that there be one record on the appeal of the above actions to the Supreme Court of the United States and that the appeals in said actions may be consolidated and treated as a single case before the Supreme Court of the United States for the pur-

poses of briefing, argument, consideration and decision, and

Whereas said appeals do not involve money or property judgments but the validity of a ministerial function by a state board,

Wherefore, It Is Stipulated as follows:

1. That there be no supersedeas bond in either of said actions;

. . . . . .

[fol. 127] 3. That the Chief Justice of the Supreme Court of the State of Wisconsin allow such appeal, enter an order of such allowance, and certify that satisfactory security for said costs have been provided.

Dated this 25 day of February, 1948.

John E. Martin, Attorney General of the State of Wisconsin; Stewart G. Honeck, Deputy Attorney General; Beatrice Lampert, Assistant Attorney General. T. H. Skemp, I. H. Hale, Attorneys for LaCrosse Telephone Corp., Petitioner and Respondent, 515 State Bank Building, LaCrosse, Wisconsin; Louis Sherman, General Counsel of IBEW, Pet. and Res., 1200 15th Street, N. W., Washington 5, D. C.

[fols. 128-129] Bond on appeal for $500.00 approved and filed Feb. 25, 1948, omitted in printing.

[fol. 130] Citation in usual form, filed Feb. 25, 1948, omitted in printing.

[fol. 131] [File endorsement omitted]

IN SUPREME COURT OF WISCONSIN

Nos. 60 and 61

[Titles omitted]

STIPULATION FOR TRANSCRIPT OF RECORD—Filed February 25, 1948

Whereas the above entitled cases were consolidated and treated as a single case before the Supreme Court of the State of Wisconsin for the purposes of briefing, argument, consideration and decision, and

Whereas an appeal has been taken from the decision of the Supreme Court of the State of Wisconsin to the Supreme Court of the United States in each of said actions, and

Whereas said appeals to the Supreme Court of the United States involved identical issues of law,

Now therefore, it is stipulated and agreed by and between the parties hereto that for the purposes of the appeal to the Supreme Court of the United States that there be but one record on said appeals and that the Clerk of the Supreme Court of the State of Wisconsin is requested to prepare and [fol. 132] forward to the Clerk of the Supreme Court of the United States the transcript of the record on appeal which shall include the following:

1. The printed appendices as filed in the office of the Clerk of the Supreme Court of the State of Wisconsin in the above actions;

2. The judgment of the Supreme Court of the State of Wisconsin dated December 23, 1947;

3. The petitions for appeal, assignments of error, and prayers for reversal as filed by the appellant, LaCrosse Telephone Corporation, and the Appellant International Brotherhood of Electrical Workers, Local B-953, A. F. of L.;

4. The order allowing the appeal in each of said actions;

5. The statement as to jurisdiction filed by each of the appellants; and by the appellee.

6. The notice calling attention to Supreme Court Rule 12 (3);

7. Citations on appeal in both cases.

8. Stipulation as to supersedeas and appeal bond;
9. Proof of service;
10. This stipulation as to praecipe;

This stipulation acknowledges service by the appellants upon the appellee of the citation for appeal and the notice calling attention to Supreme Court Rule 12 (3), and all papers required by Rule 12, Par. 2.

It is requested that the transcript be prepared as required by law, the rules of this court, and the Rules of the Supreme Court of the United States, and that the same be filed in the office of the Clerk of the Supreme Court of the United States within the time prescribed by this court in its order allowing appeal herein.

Dated this 25 day of February, 1948.

John E. Martin, Attorney General of the State of Wisconsin; Stewart G. Honeck, Deputy Attorney General; Beatrice Lampert, Assistant Attorney General; T. H. Skemp, I. H. Hale, Attorneys for LaCrosse Telephone Corp., Petitioner and Respondent, 515 State Bank Building, LaCrosse, Wisconsin; Louis Sherman, General Counsel of IBEW, Pet. and Res., 1200 15th Street, N. W., Washington 5, D. C.

[fol. 133] Clerk's Certificate to foregoing transcript omitted in printing.

[fol. 134] SUPREME COURT OF THE UNITED STATES, OCTOBER TERM, 1947.

No. 701

STATEMENT OF POINTS OF LA CROSSE TELEPHONE CORPORATION, APPELLANT, ON WHICH IT INTENDS TO RELY, AND DESIGNATION OF PARTS OF RECORD NECESSARY FOR THE CONSIDERATION THEREOF ON APPEAL, AS PROVIDED FOR BY PARAGRAPH 9 OF RULE 13 OF THE SUPREME COURT OF THE UNITED STATES—Filed May 1, 1948

Comes now the appellant in the above entitled cause, LaCrosse Telephone Corporation, and for its statement of

the points on which it intends to rely in its appeal to this court adopts the points contained in its assignment of error heretofore filed herein.

Appellant designates for the record in this case each and every document enumerated in the Stipulation for Transcript of the Record dated February 25, 1948, as being [fol. 135] necessary for the consideration of the points herein relied upon.

T. H. Skemp, I. H. Hale, Attorneys for the Appellant LaCrosse Telephone Corporation.

To John E. Martin, Attorney of the State of Wisconsin, Madison, Wisconsin, Attorney for the Appellees.

Service of the foregoing statement on behalf of the Appellee is acknowledged this 30 day of April, 1948.

John E. Martin, Attorney General; Stewart G. Honeck, Deputy; Beatrice Lampert, Assistant, Attorneys for Wisconsin Employment Relations Board.

[fol. 135a] [File endorsement omitted]

[fol. 136] SUPREME COURT OF THE UNITED STATES, OCTOBER TERM, 1947

No. 702

STATEMENT OF POINTS AND DESIGNATION—Filed May 1, 1948

Appellant, pursuant to the provisions of Paragraph 9 of Rule 13 of the Supreme Court of the United States, states that the points upon which it intends to rely in this case are as follows:

1. Appellant hereby adopts its Assignment of Errors as and for its Statement of Points upon which it intends to rely in this case.

Appellant hereby designates for the record in this case each and every paper enumerated in the Stipulation for

Transcript of Record dated February 25, 1948 and served and filed herein, as necessary for the consideration thereof.

Louis Sherman, General Counsel of the International Brotherhood of Electrical Workers, 1200 Fifteenth Street, N. W., Washington 5, D. C., Attorney for Appellant.

To John E. Martin, Attorney General of the State of Wisconsin, Madison, Wisconsin, Attorney for Appellees.

Acknowledgment of Service

Service of the foregoing Statement of Points and Designation is hereby acknowledged this 30 day of April.

John E. Martin, Atty. Gen.; Stewart G. Honeck, Deputy; Beatrice Lampert, Assistant.

[fol. 136a] [File endorsement omitted.]

[fol. 137] SUPREME COURT OF THE UNITED STATES, OCTOBER TERM, 1947

Nos. 701 & 702

ORDER POSTPONING FURTHER CONSIDERATION OF THE QUESTION OF JURISDICTION—April 19, 1948

The statements of jurisdiction in these cases having been submitted and considered by the Court, further consideration of the question of the jurisdiction of this Court is postponed to the hearing of the cases on the merits.

Endorsed on Cover: File No. 52,931, 52,932, Wisconsin, Supreme Court, Term No. 701. LaCrosse Telephone Corporation, Appellant, vs. Wisconsin Employment Relations Board, L. E. Gooding, Henry Rule and J. E. Fitzgibbon, as Members of the Wisconsin Employment Relations Board. Term No. 702. International Brotherhood of Electrical Workers, Local B-953, A. F. of L., Appellant, vs. Wisconsin Employment Relations Board, L. E. Gooding, Henry Rule and J. E. Fitzgibbon, as Members of the Wisconsin Employment Relations Board. Filed March 29, 1948. Term No. 701 O. T. 1947, 702 O. T. 1947.

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1947

No. 701 38

LA CROSSE TELEPHONE CORPORATION,
Appellant,

vs.

WISCONSIN EMPLOYMENT RELATIONS BOARD, ET AL.

APPEAL FROM THE SUPREME COURT OF THE STATE OF WISCONSIN

STATEMENT AS TO JURISDICTION

T. H. SKEMP,
Q. H. HALE,
Counsel for Appellant.

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1947

No. 701

LA CROSSE TELEPHONE CORPORATION,
Appellant,

vs.

WISCONSIN EMPLOYMENT RELATIONS BOARD,
L. E. GOODING, HENRY RULE, AND J. E. FITZGIBBON,
Appellee

I

STATEMENT AS TO JURISDICTION

The Appellant, La Crosse Telephone Corporation, concurrently with the presentation of its petition for the allowance of an appeal from the Supreme Court of the State of Wisconsin to the Supreme Court of the United States, presents herewith this statement disclosing the basis upon which the Supreme Court of the United States has jurisdiction upon such appeal to reverse the order and decree from which said appeal is taken.

II

Statutes Sustaining Jurisdiction

The statutory provision believed to sustain jurisdiction, in Title 28, Section 344A of the United States Code, Section

237A of the United States Judicial Code as amended by the Act of January 31, 1928, and particularly the following provisions thereof:

> "A final judgment or decree in any suit in the highest court of this State in which a decision in the suit could be had, where is drawn in question the validity of a treaty or statute of any State on the ground of its being repugnant to the Constitution, treaties, or laws of the United States and the decision is in favor of its validity, may be reviewed by the Supreme Court upon appeal."
>
> Section 237 Judicial Code, Title 28, Federal Code Annotated, Par. 344 (a).

III

The Statute of the State of Wisconsin, the Validity of Which Is Involved

The statute of the State of Wisconsin, the validity of which is involved is entitled the "Wisconsin Employment Relations Act," also denominated the "Employment Peace Act", Wisconsin Statutes of 1945, Chapter 111; Sections 111.01 to 111.19 inclusive. The pertinent provisions of said statutes are as follows:

> Section 111.02 (2) defines employer as "a person who engages the services of an employee."
>
> Section 111.02 (4) defines representatives as any person chosen by an employee to represent him.
>
> Section 111.02 (6) defines the term "collective bargaining unit" as all of the employes of one employer (employed within the State), except that where a majority of such employes engaged in a single craft, division, department or plant shall have voted by secret ballot as provided in Section 111.05 (2) to constitute such group a separate bargaining unit they shall

be so considered, provided, that in appropriate cases, and to aid in the more efficient administration of the employment peace act, the board may find, where agreeable to all parties affected in any way thereby, an industry, trade, or business comprising more than one employer in an association in any geographical area to be a "collective bargaining unit". A collective bargaining unit thus established by the board shall be subject to all rights by termination or modification given by this subchapter I of Chapter 111 in reference to collective bargaining units may bargain collectively through the same representative where a majority of the employes in each separate unit shall have voted by secret ballot as provided in Section 111.05 (2) so to do.

Section 111.03 provides for the creation of a board of three members and its organization.

Section 111.05 (1) provides for choosing of representatives for the purpose of collective bargaining by a majority of the employes voting in a collective bargaining unit shall be the exclusive representatives of all the employees in such unit for the purpose of collective bargaining.

Section 111.05 (2) provides that an election shall be determined by secret ballot and that the board shall upon request cause the ballot to be taken in a manner to show the wishes of the employees in any craft, division, department or plant as to the determination of the collective bargaining unit.

Section 111.05 (3) provides for certifying in writing the results of an election to the interested parties, the names of all persons submitted by an employee, or a group of employees participating in the election, excepting that the board may in its discretion exclude from the ballot one who at the time of the election stands deprived of his rights by reason of a prior adjudication of his having engaged in an unfair labor practice and also shall be prepared so as to permit of a vote against representation by anyone named on the ballot.

IV

The Date of Judgment and Application for Appeal

The final judgment of the Supreme Court of Wisconsin which is sought to be reversed was entered and made of record on December 23, 1947. Petition for appeal was presented and filed on the 25th day of February, 1948.

V

Nature of the Case and Rulings of the Court

This case presents the question of jurisdiction of the Wisconsin Employment Relations Board over two issues between the La Crosse Telephone Corporation and its employees: (1) The selection of bargaining representatives for labor; and (2) the determining of contract rights.

On September 20, 1946, the Telephone Guild, affiliated with the National Federation of Telephone Workers (hereinafter referred to as the "Guild"), filed a petition with the National Labor Relations Board at Minneapolis, Minnesota, alleging that a question of representation affecting commerce had arisen. On September 24, 1946, notice of such petition was mailed to the La Crosse Telephone Corporation. On October 8, 1946, the Guild filed a petition with the Wisconsin Employment Relations Board requesting an election among the employees of the La Crosse Telephone Corporation for the purpose of determining what, if any, representation such employees desired for the purpose of collective bargaining. On October 18, 1946, the Wisconsin Employment Relations Board took jurisdiction and conducted a hearing at La Crosse, Wisconsin, pursuant to the petition of the Guild.

On November 27, 1946, the Wisconsin Employment Relations Board directed that an election be held within 30

days and filed a memorandum decision in which it found that at the time the petition was filed with the National Labor Relations Board that a collective bargaining agreement which the La Crosse Telephone Corporation had with the International Brotherhood of Electrical Workers was by its terms to expire on December 1, 1946, since amendments thereto which had previously been petitioned for had not been approved by the IBEW and the company had not received notice of such approval prior to the notification by the National Labor Relations Board of the fact that the Guild had filed a petition alleging that a question of representation affecting commerce had arisen. On February 7, 1947, the La Crosse Telephone Corporation petitioned the Circuit Court for La Crosse County, Wisconsin for a review of the decision of the Wisconsin Employment Relations Board pursuant to the provisions of Section 111.07 (8) of the Wisconsin statutes. This petition contended that the decisions, orders and certifications, of the Wisconsin Employment Relations Board were without its jurisdiction, in excess of its statutory authority, erroneous as a matter of law, and contrary to the constitutional rights and privileges of the La Crosse Telephone Corporation (R. 102-107).

Petition for review was brought on for hearing before the Honorable R. S. Cowie, Circuit Judge of the Circuit Court of La Crosse County, Wisconsin. After hearing oral arguments and considering briefs which were filed the trial judge took the matter under advisement. While considering the issues raised by the petitioner, the decision of United States Supreme Court in the case of *Bethlehem Steel Company et al.* v. *New York State Labor Relations Board* and *Allegheny-Ludlum Steel Corporation* v. *William J. Kelly et al.*, was filed, and immediately counsel for petitioner brought such decision to the attention of Judge Cowie. On April 28, 1947, the court filed a memorandum written

decision in which the court concluded that the action taken by the Wisconsin Employment Relations Board was without jurisdiction and void. In this decision the trial judge stated:

> "It is my opinion that this decision of the United States Supreme Court leaves no constitutional authority in the Wisconsin Employment Relations Board to determine collective bargaining units and to collective bargaining elections among employes or employers engaged in interstate commerce, and of course it is admitted that the La Crosse Telephone Corporation is so engaged in interstate commerce" (R. 101-102) (Appendix A).

On May 5, 1947, judgment was entered by the La Crosse Telephone Corporation reversing and setting aside the certification decision and order made and entered by the Wisconsin Employment Relations Board.

The Wisconsin Employment Relations Board, pursuant to statutory authority, appealed to the Supreme Court of Wisconsin from the judgment of the Circuit Court of La Crosse County, Wisconsin. In this appeal the Wisconsin Employment Relations Board was represented by the Attorney General of the State of Wisconsin. The issue presented by the Attorney General in behalf of the appellant, both in its brief and argument, was that the National Labor Relations Act does not preclude the Wisconsin Employment Relations Board from conducting an election to determine the desires of employees of the La Crosse Telephone Corporation with respect to a collective bargaining representative, irrespective of whether the National Labor Relations Board has ever taken any action involving the company and its employees and irrespective of whether the action of the state board contravenes any substantive provisions of the National Act or any fixed policy of the National Board. The La Crosse Tele-

phone Corporation contended, both in its brief and in its oral argument before the Supreme Court of Wisconsin, that the decision of Judge Cowie should be sustained on the ground that the Wisconsin Employment Relations Board had no jurisdiction to conduct an election to determine bargaining representatives for the employes of the La Crosse Telephone Corporation, since the La Crosse Telephone Corporation was engaged in interstate commerce and in a business which directly affected interstate commerce. The La Crosse Telephone Corporation further contended on this appeal that the decision of Judge Cowie finding that there was no jurisdiction in the Board to determine the question of representation should also have included a finding that the Wisconsin Employment Relations Board was without its jurisdiction in determining that no contract existed betwen the La Crosse Telephone Corporation and its employees.

On December 23, 1947, the Supreme Court of Wisconsin reversed the judgment of the Circuit Court of La Crosse County and remanded the causes with direction to enter judgment sustaining the State Board's direction of the election and its certification of the results thereof. In its decision the Wisconsin Supreme Court adopted the issue of the appeal as stated by the Wisconsin Employment Relations Board in its brief:

> "Does the National Labor Relations Act preclude the Wisconsin Employment Relations Board from conducting an election to determine the desires of employees of the local (La Crosse) telephone corporation with respect to a collective bargaining representative, irrespective of whether the National Labor Relations Board has ever taken any action involving the company and its employees, and irrespective of whether the action of the State board contravenes any substantive provisions of the national act or any fixed policy of the national board?"

and held that the Wisconsin Employment Relations Board had jurisdiction and that the decision of the Supreme Court of the United States in the *Bethlehem Steel Company* case v. *New York State Labor Relations Board* case did not require a ruling that the Wisconsin Employment Relations Board was without jurisdiction in the instant case. Appendix B.

VI

Cases Sustaining Jurisdiction

Allen Bradley Local #1111, United Electric Radio and Machine Workers of America v. *Wisconsin Employment Relations Board, et al.*, 315 U. S. 740;

Bethlehem Steel Company et al. v. *New York State Labor Relations Board*, 330 U. S. 767;

Consolidated Edison Co. v. *National Labor Relations Board*, 305 U. S. 197;

Morgan v. *Commonwealth of Va.*, 328 U. S. 373;

Western Union Telegraph Co. v. *Lenroot*, 323 U. S. 490.

VII

Statement of the Grounds upon Which It Is Contended That the Questions Involved Are Substantial

This case presents the question of jurisdiction of the Wisconsin Employment Relations Board over two issues between the La Crosse Telephone Corporation and its employees: (1) The selection of bargaining representatives for labor; and (2) the determining of contract rights.

It is contended that these questions are substantial and are of such a character as to affect employer-employee relationships in industry affecting commerce.

The La Crosse Telephone Corporation is an industry engaged in interstate commerce and affecting commerce as

defined by the National Labor Relations Act. It squarely comes within the language of the following case:

> "Having such a close and substantial relation to interstate traffic that the control is essential or appropriate to the security of that traffic to the efficiency of the interstate service, and to the maintenance of conditions under which interstate commerce may be conducted upon fair terms and without molestation or hinderance."
>
> *Houston, EWT R. Co.* v. *U. S.*, 234 U. S. 342, 58 L. Ed. 1341.

Judge Cowie in his memorandum decision found that it was admitted that the La Crosse Telephone Corporation was so engaged in interstate commerce and the Supreme Court of the State of Wisconsin in its decision found that it was "rendering in connection therewith such interstate and intrastate long distance service as was incidental thereto."

The decision of the Wisconsin Supreme Court can not be reconciled with the decision of the United States Supreme Court in the *Bethlehem Steel* case.

First the Wisconsin Supreme Court relies upon and cites previous decisions of its own, such as the decision in the *International Union* v. *WERB*, 250 Wis. 550, 27 N. W. (2nd) 875, where the facts in issue were entirely different from the facts in the case at bar in that they involved the issues of unfair labor practices by employees which were not covered by the National Labor Relations Act, over which the National Labor Relations Board had never taken jurisdiction, and which therefore were proper fields of State regulation and State jurisdiction.

The National Labor Relations Act prior to its amendment under the Taft-Hartley Law did not cover the field of employee regulations. The Wisconsin statutes did cover this field and have defined what constitutes unfair labor

practices on the part of employees. Under its police power the State therefore had the right to take jurisdiction since there had been no Congressional action and no regulations by the National Labor Relations Board pertaining to the subject matter of unfair labor practices by employees. The United States Supreme Court so held in the case of *Allen Bradley Local* v. *WERB*, 315 U. S. 740. The case at bar however, presents an entirely different factual situation. Both the Wisconsin Employment Peace Act and the National Labor Relations Act provide for the selection of appropriate units for bargaining purposes. The administrative boards created by such acts have enacted regulations for the conduct of elections. Here we have State regulations and Federal regulations covering the same subject matter. Therefore under the ruling of the United States Supreme Court in the *Bethlehem Steel* case the jurisdiction of the National Labor Relations Board is exclusive and there is no jurisdiction in the Wisconsin Employment Relations Board.

The following quotations from the decision of the Wisconsin Supreme Court in the case at bar when compared with the quotations from the decision of the United States Supreme Court in the *Bethlehem Steel* case demonstrate the irreconcilable conflict of the two decisions.

Wisconsin Supreme Court:	United States Supreme Court:
1. "That although the National Board's power over that subject is paramount, it is not exclusive in such a case as we have here, until the Federal power is exercised or jurisdiction thereto is taken as to particular employees."	1. The **Companies** contend that the National Board's jurisdiction over their labor relations is exclusive of said power; the **state** contends on the contrary that while Federal power over the subject is paramount, it is not exclu-

Wisconsin Supreme Court:	United States Supreme Court:
	sive and in such a case as we have here until the Federal power is actually exercised as to the particular employees, state power may be exercised." **"The State argues for a rule that would enable it to act until the Federal Board had acted in the same case."**
2. "The State Board's action, which is under consideration on these appeals, does not involve the exercise of its discretion, nor the formulation of any policy which does or could vary from the National Labor Relations Act."	2. "Comparison of the State and Federal Statutes will show that both governments have laid hold of the same relationship for regulation, and involves the same employers and the same employees. Each has delegated to an administrative authority a wide discretion in applying this plan of regulation to specific cases, and they are governed by somewhat different standards. Thus if both laws are upheld, two administrative bodies are asserting a discretionary control over the same subject matter, conducting hearings, supervising elections and determining appropriate units for bargaining in the same plant. They might come out with the same determination, or they might come out with conflicting ones as they have

Wisconsin Supreme Court:	United States Supreme Court:
	in the past. Cf. Re Creamery Package Mfg. Co. 34 NLRB (f) 108; Wis. Emp. Rel. Bd. case III No. 348 E-117. But the power to decide a matter can hardly be made dependent on the way it is decided. As said by Mr. Justice Holmes for the Court, 'When Congress has taken the particular subject-matter in hand coincidence is as ineffective as opposition . . .' * * * If the two boards attempt to exercise a concurrent jurisdiction to decide the appropriate unit of representation, action by one necessarily denies the discretion of the other. The second to act either must follow the first, which would make its action useless and vain, or depart from it, which would produce a mischievous conflict. The State argues for a rule that would enable it to act until the Federal board had acted in the same case. But we do not think that a case by case test of Federal supremacy is permissible here."

A comparison of the Wisconsin Employment Peace Act and the National Labor Relations Act demonstrates that they differ in substantial respects.

A noteworthy conflict is the mandatory requirement permitting employees in craft units to determine whether they wish to constitute a separate bargaining unit. There is no similar provision in the National Labor Relations Act. The Supreme Court of the United States in the *Bethlehem Steel Company* case, because of a similar situation ruled against State jurisdiction in that case. The following language of the *Bethlehem Steel Company* case is in point:

> "Each has delegated to an administrative authority a wide discretion in applying this plan of regulation to specific cases, and they are governed by somewhat different standards. Thus if both laws are upheld two administrative bodies are asserting a discretionary control over the same subject matter, conducting hearings, supervising elections and determining appropriate units for bargaining in the same plant. They might come out with the same determination or they might come out with conflicting ones as they have in the past."

Another grievous error of the Wisconsin Supreme Court is that the Court erroneously states in its decision that the State Board's action in the instant case is ministerial and does not involve the exercise of discretion. Before determining that the Board would take jurisdiction of the representation issue, it was necessary for the board to determine the status of a contract which the La Crosse Telephone Corporation had entered into with the International Brotherhood of Electrical Workers, Local B-953. Appellant contends that this was not a ministerial function but a judicial function and it necessarily involved both issues of law and fact.

Likewise, the Supreme Court of Wisconsin erred in its decision in holding that the State Board's action in the instant case does not involve the formulation of any policy. It is contended that this is error, since the question of what effect a contract between an employer and employee should

have in determining whether or not jurisdiction should be taken for the purpose of conducting an election to determine a bargaining representative for the employees, is solely a matter of policy. The National Labor Relations Board has at times held that a contract is a bar to an election and at other times held that a contract is not a bar to an election. The policy of the Wisconsin Board has likewise varied from time to time. It is contended that the case at bar demonstrates the difficulty pointed out by the Supreme Court of the United States in the *Bethlehem Steel Company* case in ruling against a case by case test of Federal supremacy over jurisdiction by a State Board.

It is further asserted that appellant's contentions have been sustained by a lower court in the recent decision in the case of *Pittsburgh Railway Company*, 54 Atl. (2) 891.

It is further contended that the legislative intent of the United States Congress as to the exclusive jurisdiction of the National Labor Relations Board is indicated by the Congressional amendments to the National Labor Relations Act commonly known as the Taft-Hartley law. By such amendments Congress has provided that the National Labor Relations Board is empowered to cede to a State agency jurisdiction over communications and other industry which are predominantly local in character, even though such cases involve labor disputes affecting commerce, unless the provisions of the State Act are inconsistent with the National Act or have received a construction inconsistent therewith.

VIII

Conclusion

The appellant, La Crosse Telephone Corporation contends that the decision of the Wisconsin Supreme Court entered on December 23, 1946, should be reversed and set

aside and that the decision of the Circuit Court for La-Crosse County should be reinstated setting aside the certification of an order issued by the Wisconsin Employment Relations Board on January 14, 1947, for the reason that the State Board exceeded its jurisdiction over the subject matter of the proceeding, contrary to the provisions of Section 8, Article I and Paragraph Two of Article VI of the Constitution of the United States.

IX

Attached hereto are copies of the memorandum decision of Judge Cowie, marked Appendix A, and a copy of the decision of the Supreme Court of the State of Wisconsin, marked Appendix B.

Respectfully submitted,

T. H. Skemp,
Q. H. Hale,
Attorneys for Appellant,
La Crosse Telephone Corporation.

APPENDIX "A"

Memorandum Decision of Judge Cowie

After a thorough consideration of the arguments presented upon the appeals in the above entitled matter from the Wisconsin Employment Relations Board, and a study of the extensive briefs submitted, I have come to the conclusion that the very recent decision by the Supreme Court of the United States in Bethlehem Steel Company et al. *v.* New York State Labor Relations Board, and The Allegheny Ludlum Steel Corp. *v.* Wm. J. Kelly et al., is so conclusive of the legal problems here involved as to relieve this court of the necessity of determining the questions raised on these appeals. In other words, it is my opinion that this decision of the United States Supreme Court leaves no constitutional authority in the Wisconsin Employment Relations Board to determine collective bargaining units and to conduct collective bargaining elections among employees or employers engaged in interstate commerce, and of course it is admitted that the La Crosse Telephone Corporation is so engaged in interstate commerce.

It is not necessary that I set forth at any length any extracts from the opinion of the United States Supreme Court above referred to because all of the parties are familiar with the substance of that decision and its scope. I am, therefore, concluding this memorandum decision merely with the statement that in my opinion the action taken by the Wisconsin Employment Relations Board is without jurisdiction and void in the instant case.

The attorneys for the appellants will prepare such formal order or judgment as is necessary to carry out the indicated conclusion of the court.

Dated at La Crosse, Wisconsin, this 28th day of April, 1947.

By the Court.

R. S. Cowie,
Judge.

APPENDIX "B"

IN SUPREME COURT OF THE STATE OF WISCONSIN, AUGUST TERM 1947

Nos. 60 and 61

No. 60

LA CROSSE TELEPHONE CORPORATION, *Respondent*,

vs.

WISCONSIN EMPLOYMENT RELATIONS BOARD et al., *Appellants*

No. 61

INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, Local B-953, A. F. of L., *Respondent*

vs.

WISCONSIN EMPLOYMENT RELATIONS BOARD et al., *Appellants*

Appeals from judgments of the Circuit Court for LaCrosse County. R. S. Cowie, Circuit Judge. *Reversed.*

Separate actions were brought in the Circuit Court by petitions of the La Crosse Telephone Corporation and the International Brotherhood of Electrical Workers, Local B-953, A. F. of L. respectively for the review, under Sec. 111.07 (8) Stats. of a certification made by the Wisconsin Employment Relations Board of the election of the Telephone Guild of Wisconsin as the bargaining representative for certain employees of the Telephone Corporation. The Circuit Court reversed and set aside the certification, and from judgments entered accordingly the Wisconsin Employment Relations Board appealed.

FAIRCHILD, J.: The certification made by the Wisconsin Employment Relations Board (hereinafter called State Board)

of the election of the Telephone Guild of Wisconsin (herein called Guild) as the bargaining representative for certain employees of the La Crosse Telephone Corporation (herein called Employer) was reversed and set aside by the circuit court on the grounds that the Employer is engaged in interstate commerce, and that the decision in *Bethlehem Steel Company* v. *New York State Labor Relations Board*, 330 U. S. 767, 67 Sup. Ct. 1026, 96 L. Ed. 1054, leaves no constitutional authority in the State Board to determine collective bargaining units and conduct collective bargaining elections among employees or employers engaged in such commerce.

The principal issue on this appeal is, as stated in the State Board's Brief,

"Does the National Labor Relations Act preclude the Wisconsin Employment Relations Board from conducting an election to determine the desires of employees of the local (La Crosse) telephone corporation with respect to a collective bargaining representative, irrespective of whether the National Labor Relations Board has ever taken any action involving the company and its employees, and irrespective of whether the action of the state board contravenes any substantive provisions of the national act or any fixed policy of the national board?"

The employer is a Wisconsin corporation and all its employees are employed in La Crosse county in this state in its operation of a local telephone service within the La Crosse area, and rendering in connection therewith such intrastate and interstate long distance service as is incidental thereto. In and for some time prior to December, 1945, the employees in its *traffic* and its *plant* departments (which included all excepting its office workers) were represented for collective bargaining purposes by the International Brotherhood of Electrical Workers, Local B-953, A. F. of L. (herein called Local B-953). On December 19, 1945, Local B-953 and the Employer entered into a collective bargaining agreement which was to continue in effect until December 1, 1946, and from year to year thereafter unless either party should give written notice ninety days

prior to the annual expiration date requesting that the agreement be amended or cancelled, and if an amendment was desired the contents thereof should be submitted by such party to the other on or before thirty days prior to the termination date of any year in which the ninety day notice was given, but that changes mutually agreeable may be made at any time; and in said agreement a method of negotiation for the settlement of differences was also provided under which the Employer and Local B-953 agreed to meet and deal with each other through their duly accredited officers and committees. Local B-953 in a letter dated August 28, 1946, and addressed to E. B. Samp, Employer's vice president and manager, stated that, "To meet the notice requirements of our agreement, we wish to notify you we desire to amend the agreement." Pursuant thereto negotiations concerning a new wage schedule were commenced between Samp and a committee of the traffic department employees on August 31, 1946 and were likewise commenced between Samp and a plant department committee on September 3, 1946. Wage schedules for each department were agreed upon in those negotiations and were incorporated in a letter signed by Samp and by members of Local B-953 committees and addressed to Raymond A. Panzer at Eau Claire, who was business manager of Local B-953. In the letter in relation to the plant department employees it was stated—

"These negotiations resulted in the following proposed additions, changes and dejetions to our present agreement and were acceptable to both parties alike as evidenced by the signatures of acceptance hereon * * * It was clearly understood by the undersigned that the other provisions of the present agreement as it affects traffic personnel remain unchanged."

However, in addition, representatives of Local B-953 and the Employer's officials on September 19 or 20, 1946 began negotiations for a provision which also was to be incorporated in each of the proposed contracts respecting the date when it might be opened for new wage negotiations; and at a meeting of Local B-953 on September 23, the proposed wage schedule amendments negotiated by its com-

mittees were rejected by it on the recommendation of its business manager because of the lack of a satisfactory reopening clause as to when the wage agreements could be modified under such a clause. Subsequently said business manager and Employer's officials tentatively agreed upon a date when the contract might be so reopened but, instead of accepting that date the members of Local B-953, on September 25, 1946, finally voted in favor of another date, March 1, as the reopening date. The employer was informed of Local B-953's ratification of this amendment by a letter mailed from Eau Claire on September 27, and provisions respecting said reopening date were subsequently added to the above stated letters containing the proposed wage schedules, and thereafter a new contract was drafted for the year beginning December 1, 1946. But it had not been signed by the Employer's officials and the officials of Local B-953 when, on October 18, 1946, the State Board conducted a hearing in proceedings which resulted ultimately in the election and certification of the Guild as the bargaining representative of the plant and traffic departments' employees of the Employer.

Meanwhile, during the period of the above stated negotiations the Guild, on September 20, 1946, filed with the National Labor Relations Board (herein called the National Board) a petition to have the Guild certified as the bargaining representative of the Employer's employees, who were theretofore represented by Local B-953; and the Employer was notified by a letter from the National Board's office in Minneapolis, dated September 24, 1946, of the filing of the Guild's petition. But there is nothing in the record herein to indicate that the National Board ever took jurisdiction of or pursuant to said petition; and on October 8, 1946, the Guild filed with the National Board a request to approve the withdrawal thereof. Then on that date the Guild filed with the State Board a petition for the holding of an election by all of the Employer's employees to determine what if any representation they desired for the purpose of collective bargaining. Pursuant to this petition the State Board conducted a hearing on October 18, 1946, and on November 27, 1946, filed its decision determining—

in connection with finding the facts stated above as to the negotiations in 1946 between the Employer and Local B-953, and its rejection of the proposed amendments to the collective bargaining contract because there was no provision therein specifying the reopening date for reviewing the wage question, and there was no determination by Local B-953 as to such date until at the meeting of its members on September 25, as to which the Employer was notified on September 26 or 27,—that until the Employer was given such notice,—"no binding agreement has been entered into between the Employer and union"; and that "There was, therefore, no binding agreement when the company was notified that another union claimed to represent a majority of the employees that the I. B. E. W. proposed to represent, and a contract entered into subsequent to the receipt of such notice cannot operate as a bar to an election."

Upon the matters thus determined, the State Board directed the conduct of the election in question. In its direction the Board gave the employees in each department (i.e., the plant, traffic and likewise the office departments) the opportunity to determine whether or not they desired to constitute themselves separate units; and directed that for the voting by the plant and traffic departments employees both the Guild and Local B-953 shall appear on the ballot, while for the office employees,—because of the fact that Local B-953 does not desire to represent them,—the only question submitted would be whether they desired to be represented by the Guild or not. At the election conducted by the State Board on November 27, 1946, the majority of the plant and traffic departments workers voted to constitute a single bargaining unit, which is the same group of employees which Local B-953 was bargaining for in the past and desired to continue to represent. By those employees, 91 votes were cast for the Guild, and 14 in favor of Local B-953, as their representative. The office employees voted not to be included in the same bargaining unit as the other departments and not to be represented by any union. Pursuant to that election, the State Board on January 14, 1947, certified that the Guild was elected by the employees of the Employer (excepting its executive, super-

visory and office employees) as their bargaining representative; and this certification Local B-953 and likewise the Employer petitioned to have reversed and set aside by the Circuit Court.

There is nothing in the record of the proceedings before the State Board or in the Circuit Court to indicate that the National Board has ever in any manner exercised any of its powers or discretion or otherwise taken jurisdiction of any question or phase of the Employer's or its employees' industrial relations. Although a petition that the Guild be certified as the bargaining representative of the Employer's employees had been filed by the Guild with the National Board on September 20, 1946, that Board apparently never took jurisdiction pursuant thereto, and the petition was withdrawn at the request of the Guild before it filed, on October 8, 1946, its petition with the State Board for the latter's direction to conduct and hold such an election. (See footnote below on this sheet.)

In *International B. of E. W.* v. *Wisconsin E. R. Board*, 245 Wis. 532, 15 N. W. (2) 823, we pointed out, in line with the federal courts' rulings, that the National Board is not required to accept jurisdiction or exercise its powers on every petition or complaint filed with it. As we stated in that case,—

(p. 539) "When the National Labor Relations Board has acted in a particular case, the question of whether there is a conflict between the two jurisdictions is to be determined of course by the provisions of these acts. * * * If no proceeding is had under the National Labor Relations Act, no conflict of jurisdiction can arise. This matter was fully discussed in the Rueping L. Co. Case already referred to. *The National Labor Relations Board having never taken jurisdiction to certify the name of a bargaining agent, the state board could entertain proceedings relating to violations of state law. In so doing there was under such circumstances no conflict of jurisdiction.* Not every labor dispute arises to such dignity that it impedes and obstructs interstate commerce although the employer may be engaged in what has been defined as interstate commerce."

In *Public S. E. Union* vs. *Wisconsin E. R. Board*, 246 Wis. 190, 194, 16 N. W. (2) 823, we said,—

"The appellants contend—(1) That the board had no jurisdiction to issue an order restraining the president of the union from acting or attempting to act as a representative in any capacity for the employees of the company; suspending the right of the union to act as a collective bargaining representative or as a representative in any capacity for the employees of the company and suspending the right of the officers of the union to serve as a representative in any capacity of the employees of the company. • • • We have considered the matter of conflict between Wisconsin and federal law in a number of other cases and have held that where the National Labor Relations Board has not taken jurisdiction in the controversy, no conflict exists."

See also *Allen-Bradley Local 1111* v. *Wisconsin E. R. Board*, 315 U. S. 740, 86 L. Ed. 1154 (237 Wis. 464, 295 N. W. 791).

And there is nothing stated in our decision in *International Union* v. *Wisconsin E. R. Board*, 250 Wis. 550, 27 N. W. (2) 875 which should be deemed to warrant concluding that the State Board's action in ordering the conduct and certifying the result of the election in question herein was not acting within its jurisdiction and powers. As we stated then, in duly applying and giving effect to the decision in *Bethlehem Steel Co.* v. *New York State Labor Relations Board*, supra,—(p. 567)

"What the court held was that the National Labor Relations Board had exercised the jurisdiction delegated to it

---

Apparently (as is stated in an affidavit filed by counsel for Local B-953 on its motion to dismiss these appeals on the ground that the question involved therein has become moot) the Guild in May 1947 filed another petition with the National Board requesting said Board to hold an election to determine a bargaining representative for the Employer's employees, and that petition was dismissed on the recommendation of the Board's regional director.

under the federal act by declining to designate the foremen as a bargaining unit. The declination was an exercise of its jurisdiction, just as much as granting it would have been. The jurisdiction vested in the National Labor Relations Board was to determine whether it would designate the foreman as a bargaining unit, and it exercised jurisdiction when it denied the application. No such situation exists in the instant case as was involved in the Bethlehem Steel Co. Case, supra. In the first place, no application has been made to the National Labor Relations Board to exercise any jurisdiction of the labor dispute here involved. *The National Labor Relations Board not having exercised any jurisdiction* of such labor dispute *the state board may exercise jurisdiction* of it. *No conflict is here involved.* There was a direct conflict in the Bethlehem Steel Co. Case. The National Labor Relations Board had determined that foremen could not form a unit for collective bargaining and the state board said that they could and formed such a unit. The National Labor Relations Board's decision barred the state board from taking any action at all."

The State Board's action, which is under consideration on these appeals, does not involve the exercise of its discretion nor the formulation of any policy which does or could vary from those of the National Labor Relations Act. The mere fact-finding procedure of the State Board in the ascertainment of the facts, and its thereupon ordering and conducting an election and certifying the result thereof, constitutes action in merely its ministerial capacity (*United R. & W. D. S. E. of A.* v. *Wisconsin E. R. Board*, 245 Wis. 636, 641, 15 N. W. (2) 844; *J. F. Quest Foundry Co.* v. *International M. & F. W. Union*, 216 Minn. 436, 441, 13 N. W. (2) 32; *National Labor Relations Board* v. *Botany Worsted Mills*, 133 Fed. (2) 876, 882); and does not deny to the National Board or interfere with its right to exercise its discretion and powers if it should ever conclude to exercise its jurisdiction and powers in that respect to determine the appropriate bargaining representative or unit of representation. But, although the National Board's power over that subject is paramount, it is not exclusive in such a case as

we have here, until the federal power is exercised or jurisdiction thereto is taken as to particular employees.

There cannot be sustained the contention of the Employer and Local B-953 that the State Board erred in determining that no new binding contract had been finally entered into between them in 1946 prior to the Employer's receiving notice that another union claimed to represent a majority of the employees whom Local B-953 had been representing. Although in the course of the negotiations between Samp and committees of employees in the traffic and also the plant departments they had come to agree, by September 19 or 20, as to the wage schedules and working hours, no new contract had been completely written or signed by the Employer and by Local B-953, as the bargaining agent, because, as stated above, they had not been able, in their negotiations, to agree upon the date at which the proposed contract might be reopened for new wage negotiations. After the amended wage schedule and working hours, which had been negotiated by Samp and the employee committees, were rejected by the employees' action at their Local B-953's meeting on September 23 because of the lack of a mutually satisfactory reopening provision, the Employer was not informed until by a letter mailed from Eau Claire on September 27, that the union membership finally voted to set March 1 as the date on which negotiations as to wages might be reopened. But a new contract for the year beginning December 1, 1946, was not drafted until some time after September 27, 1946, and apparently no such contract had been executed by the officials of Local B-953 or the Employer when, on October 8, 1946, the Guild filed its petition with the State Board for an election of the employees to determine what collective bargaining representation they desired, or even when the Board filed its direction for the holding of such election.

Neither can there be sustained the Employer's and Local B-953's contention that the results of the balloting at the election did not provide sufficient basis for the State Board's certification that the Guild had been selected as the majority representative of the employees in the traffic and the plant departments, and that the Guild's petition be dismissed in so far as it related to the office employees. As claimed by

the State Board, the results of the votes cast appear to be to the following effect. Of the 114 employees in the traffic department who were eligible to vote, 52 voted against having the employees of that department bargaining collectively as a separate unit, and 13 in favor thereof; and 64 voted for the Guild and 1 for Local B-953 as their bargaining representative. Of 40 employees in the plant department eligible to vote, 25 voted against a separate bargaining unit, and 12 in favor thereof; and 27 voted for the Guild and 13 for Local B-953 as their representative. Consequently of the 105 employees who voted that they desired to bargain together, 91 desired to be represented by the Guild, and 14 by Local B-953. Of 31 office employees eligible to vote, 10 voted in favor of a separate unit, and 18 voted against it or having any collective bargaining representation. The vote as to whether the employees of the traffic department desired to bargain as a separate unit, and as to whether the employees of the plant department desired to bargain as a separate unit was decidedly against each of these departments bargaining as a separate unit. The alternative thereto was not necessarily a unit which would include office employees. No question submitted to the employees on their ballots was contingent upon the result of any other, either in wording or in spirit. The votes of the employees in the traffic and plant departments as to who should constitute their representative for collective bargaining purposes were unconditional; and of the 105 employees in those departments who voted that they desired to bargain as a unit, 91 voted unconditionally to be represented by the Guild. The State Board had published advance notices of the election with sample ballots, but neither Local B-953 nor any other party made any request of the Board prior to the election that it be conducted in a different manner. If there were any objection to the manner in which the Board proposed to hold the election, the objection should have been submitted to the Board, and as none was so submitted, it cannot be raised for the first time upon review in court. As is provided in sec. 111.07 (7), Stats.,— "no objection that has not been urged before the board shall be considered by the court unless the failure or

neglect to urge such objection shall be excused because of extraordinary circumstances."

It follows that the judgments under review must be reversed and the causes remanded with directions to enter judgments sustaining the State Board's direction of the election and its certification of the results thereof.

By the Court:—Judgments reversed in each case, and causes remanded with directions to enter judgments in accordance with this opinion.

(5591)

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1947

No. 702

INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, LOCAL B-953, A. F. OF L.,
Appellant,

vs.

WISCONSIN EMPLOYMENT RELATIONS BOARD, ET AL.

APPEAL FROM THE SUPREME COURT OF THE STATE OF WISCONSIN

STATEMENT AS TO JURISDICTION

LOUIS SHERMAN,
Counsel for Appellant.

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STATEMENT AS TO JURISDICTION

I. Preliminary Statement

In compliance with Rule 12 of the Rules of the Supreme Court of the United States, Petitioner-Respondent International Brotherhood of Electrical Workers, Local B-953 A. F. of L. (hereinafter called appellant) respectfully submits this statement showing the grounds upon which it contends that the Supreme Court of the United States has jurisdiction upon appeal to review the final judgment of the

Supreme Court of Wisconsin made and entered in the above entitled cause on December 23, 1947.

(a) *Statutory Provisions Sustaining Jurisdiction*—The statutory provisions sustaining the jurisdiction of this appeal by the Supreme Court of the United States are contained in section 237(a) of the United States Judicial Code, as amended by the Act of January 31, 1928 (Act of Feb. 13, 1925, Ch. 229 Sec. 1, 43 Stat. 937; Act of January 31, 1928, Ch. 14 Sec. 1, 45 Stat. 54; 28 U. S. C. A. 344(a).)

(b) *Statute of the State, the Validity of Which is Involved*—The Statute of the State of Wisconsin, the validity of which is involved is the Wisconsin Employment Peace Act (Wisconsin Statutes (1945 ed.) Chapter 111, Sub-chapter I, Secs. 111.01 to 111.19 pp. 1795 to 1806). The pertinent provisions of said statute are set forth in Appendix A hereto.

(c) *Dates of Judgment and Appeal*—The final judgment of the Supreme Court of Wisconsin which is sought to be reviewed was entered in the office of the Clerk of said Court on December 23, 1947. The petition for appeal was presented on Feb. 25, 1948 and the appeal was allowed on Feb. 25th, 1948.

II. Nature of the Case and the Rulings

This case arose as the result of the Petition filed on October 8, 1946, by the Telephone Guild of Wisconsin (hereinafter referred to as the Guild) for an election among the employees of La Crosse Telephone Corporation of La Crosse, Wisconsin, to determine the bargaining representative for such employees. A hearing was held on this Petition at La Crosse by the Wisconsin Employment Relations Board on October 18, 1946. The Corporation and International Brotherhood of Electrical Workers, Local B-953

A. F. of L. objected to the Requested Direction of Election on a number of grounds, including the contention that the Corporation and International Brotherhood of Electrical Workers, Local B-953 A. F. of L. had a binding collective bargaining agreement. On November 27, 1946, the Wisconsin Employment Relations Board entered and filed a Direction of Election and pursuant to such Direction the Board conducted an election for bargaining representatives on December 17, 1946, following which the Wisconsin Employment Relations Board on January 14, 1947, certified the Guild as the exclusive collective bargaining representative for all employees in the Traffic and Plant Departments, excluding executive and supervisory employees.

Prior to the filing of the Petition for certification of representatives with the State Labor Relations Board, the Guild filed a petition for certification as a bargaining representative with the National Labor Relations Board on September 20, 1946. On October 8, 1946, the same day that the Guild filed its Petition with the State Board, the Guild requested the National Labor Relations Board to approve a withdrawal of its Petition to that Board.

On February 7, 1947, International Brotherhood of Electrical Workers, Local B-953 A. F. of L. filed with the Circuit Court of La Crosse County a Petition for review of the certification of bargaining representatives by the Wisconsin Employment Relations Board in this case under Section 111.07(8) of the Wisconsin Statutes. This petition contended that the decisions, orders and certifications of the Wisconsin Employment Relations Board are contrary to the Constitutional rights and privileges of the Petitioner in that Chapter 111 of the Wisconsin Statutes has been so construed and applied as to bring it into conflict with the National Labor Relations Act and Article I, Section 8, and Article VI of the Constitution of the United

States; that the Wisconsin Employment Relations Board had no jurisdiction over the subject matter for the reason that the National Labor Relations Board had previously undertaken to exercise the jurisdiction which the National Labor Relations Act conferred upon it and has not, insofar as the record discloses, relinquished such jurisdiction; that the decision and order of the Wisconsin Employment Relations Board affects the status of the employees of the La Crosse Telephone Corporation and causes a forfeiture of collective bargaining rights guaranteed to the Petitioner under the National Labor Relations Act and that the certification made by the Wisconsin Employment Relations Board is in excess of its statutory authority and jurisdiction because the La Crosse Telephone Corporation is engaged in interstate commerce and the question of the representation of its employees is, therefore, a matter within the jurisdiction of the National Labor Relations Board under the National Labor Relations Act. (R. pages 5 to 7.)

Judge Cowie of the Circuit Court of La Crosse County after considering the arguments in the case came to the conclusion that the decision of the Supreme Court of the United States in *Bethlehem Steel Company, et al.* v. *New York State Labor Relations Board* and *Allegheny Ludlum Steel Corporation* v. *William J. Kelley et al.*, leaves no Constitutional authority in the Wisconsin Employment Relations Board to determine collective bargaining units and to conduct collective bargaining elections among employees or employers engaged in Interstate commerce and referred to the admission that the La Crosse Telephone Corporation is so engaged in interstate commerce.

This decision was rendered on April 28, 1947, and judgment was entered May 9, 1947, reversing and setting aside the certification of a bargaining representative made on January 14, 1947, by the Wisconsin Employment Relations

Board for employees of the La Crosse Telephone Corporation.

The Wisconsin Employment Relations Board appealed through the Attorney General of the State of Wisconsin, to the Supreme Court of Wisconsin from the judgment of the Circuit Court of La Crosse County. The appellant in this cause argued in its brief and orally before the Supreme Court of Wisconsin that the decision of Judge Cowie should be sustained on the ground that the Wisconsin Employment Relations Board has no jurisdiction to conduct elections or to certify collective bargaining representatives among and for employees employed by an employer engaged in interstate commerce. It was further contended by appellant that any such purported exercise of jurisdiction is null and void as are any proceedings or order based thereon, because contrary to Article I, Section 8, and Article VI of the Constitution of the United States, such matter falling within the sole and exclusive jurisdiction of the National Labor Relations Board. Appellant further contended before the Supreme Court of Wisconsin that the State Board would have no authority to enforce its certification in the unfair labor practice proceedings then pending by reason of the enactment of the Labor Management Relations Act of 1947 and in particular Section 10(a) of such Act providing for the ceding of jurisdiction by the National Labor Relations Board to State labor relation agencies. The Supreme Court of Wisconsin in a decision rendered December 23, 1947, reversed the judgment of Judge Cowie of the Circuit Court of La Crosse County and remanded the cause with directions to enter judgments in accordance with its opinion which sustained the State Board's Direction of Election and its certification of the Guild. The Supreme Court of Wisconsin ruled that the National Labor Relations Board has paramount power over

the subject of bargaining representatives, but that such power is not exclusive in the instant case until the federal power is exercised or jurisdiction is taken as to particular employees. The Supreme Court of Wisconsin was also of the view that the decision of the Supreme Court of the United States in *Bethlehem Steel Company* v. *New York State Labor Relations Board* did not require a ruling in this case that the State Board is without jurisdiction.

It is submitted that the foregoing demonstrates that in this case there is drawn in question the validity of a statute of the State of Wisconsin on the ground of its being repugnant to the Constitution or laws of the United States and that the final judgment here sought to be reviewed of the Supreme Court of Wisconsin, that being the highest court of the State of Wisconsin in which a decision in this case could be had, is in favor of the validity of said statute. The foregoing also demonstrates that the validity of such statute has been drawn in question by appellant at each stage of the judicial proceedings in this case. Accordingly it is clear that under the provisions of Section 237(a) of the Judicial Code, as amended, the Supreme Court of the United States has jurisdiction to review upon appeal said final judgment of the Supreme Court of Wisconsin.

Cases which appellant believes sustain such jurisdiction are the following:

Allen-Bradley Local No. 1411, United Electrical, Radio and Machine Workers of America, et al., v. *Wisconsin Employment Relations Board, et al.*, 315 U. S. 740 (1942);

Bethlehem Steel Co. et al., v. *New York State Labor Relations Board*, 330 U. S. 767 (1947);

Butler Bros. v. *McColgan*, 315 U. S. 501 (1942);

Chaplinsky v. *New Hampshire*, 315 U. S. 568 (1942);

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Standard Oil Co. of California v. *Johnson, Treasurer of California*, 316 U. S. 481 (1942);
Taylor v. *Georgia*, 315 U. S. 25 (1942).

III. The Questions Involved in the Appeal here Sought Are Substantial

The question in this cause is whether the National Labor Relations Board has exclusive jurisdiction over the conduct of elections to determine bargaining representatives in industry affecting commerce. A decision on this point is of great importance to appellant in the conduct of its affairs in the various States and is also of great importance to all employers and employees engaged in industry affecting commerce.

A—*This cause presents a "question of representation affecting commerce."* The National Labor Relations Act defines the term "affecting commerce" as

> "meaning in commerce, or burdening or obstructing commerce or the free flow of commerce, or having led or tending to lead to a labor dispute burdening or obstructing commerce or the free flow of commerce" (Sec. 2(7)).

It is admitted that the La Crosse Telephone Corporation is a telephone company in the City of La Crosse which is engaged in the furnishing of telephone communication, both within the State of Wisconsin and to various points outside the State of Wisconsin by means of long distance telephone connections. It has been held in the case of

National Labor Relations Board v. *Central Missouri Telephone Company* (115 Fed. 2d 563 (C. C. A. 8)) that a telephone company whose lines are wholly within one State but connected with lines of other companies in other States for the purpose of transmitting calls to points outside of the home State is an instrumentality of, and thus is engaged in interstate commerce within the meaning of the Act regardless of the fact that such long distance calls constitute only a small percentage of the total business.

There can be no dispute that the La Crosse Telephore Company is engaged in interstate commerce and that a question of representation of its employees is a "question of representation affecting commerce" within the meaning of Section 9 of the National Labor Relations Act.

B—*The question over which the State Board in the state proceeding seeks to assert jurisdiction is covered by the National Act and is within the exclusive jurisdiction of the National Board.* The basic position of the Supreme Court of Wisconsin appears to be that the power of the National Board is not exclusive until the federal power is exercised or jurisdiction is taken as to particular employees. This rule would lead to a case by case determination of whether a state labor relations board has jurisdiction to determine the bargaining representative for a company whose operations fall within the scope of the National Act.

The decision of the Supreme Court of the United States in the *Bethlehem Steel Company et al.*, v. *New York State Labor Relations Board* (330 U. S. 767, 12 CCH Labor Cases Page 51,899) rejects this position. In that case a state labor relations board sought to make a determination of the appropriateness of a bargaining unit for foremen of a plant belonging to an industry subject to the jurisdiction of the National Board. The majority of the court ruled that the State Board had no jurisdiction and it is immaterial

whether the particular case has been acted upon by the National Board since it would be improper to apply a case by case test in determining the question of whether a State Board has power over such circumstances. Mr. Justice Jackson made the following rule in his opinion for the majority of the court:

> "If the two boards attempt to exercise a concurrent jurisdiction to decide the appropriate unit of representation, action by one necessarily denies the discretion of the other. The second to act either must follow the first, which would make its action useless and vain, or depart from it, which would produce a mischievous conflict. The State argues for a rule that would enable it to act until the federal board had acted in the same case. But we do not think that a case by case test of federal supremacy is permissible here. The federal board has jurisdiction of the industry in which these particular employers are engaged and has asserted control of their labor relations in general. It asserts, and rightfully so, under our decision in the *Packard* case, *supra*, its power to decide whether these foremen may constitute themselves a bargaining unit. We do not believe this leaves room for the operation of the state authority asserted." (12 CCH Labor Cases 51,899. Page 51,903)

It is respectfully submitted that the ruling quoted above should control the disposition of the instant case.

The position asserted in this Statement has been adopted in two recent cases—*Food Tobacco Union* v. *Smiley*, dated October 30, 1947 (C. C. A. 3) (13 Labor Cases Par. 61144) and *Pittsburgh Railways Company Substation Operators and Maintenance Employees* (Case 54 A. (2d) 894) (13 Labor Cases Par. 64,028)

It should be noted that at the time the *Bethlehem Steel* case was decided by the Supreme Court the policies of the National Labor Relations Board and the State Labor Rela-

tions Boards with respect to the certification of bargaining units of foremen were identical.

Furthermore, the Wisconsin Employment Peace Act and the National Labor Relations Act differed in substantial respects on the holding of elections and the determination of appropriate units. This is particularly true with respect to the mandatory requirement in the Wisconsin Act for permitting employees in craft units to determine whether they wish to constitute a separate bargaining unit.

The action of the State Board in this particular case was not merely the performance of a ministerial function in holding an election; it also involved the making of a ruling on the applicability of the contract-bar ruling against elections. The procedure in this case, therefore, demonstrates the difficulty pointed out by the Supreme Court of the United States in the *Bethlehem Steel* case in permitting a case by case determination of whether a State Board has jurisdiction over a question of representation affecting commerce.

The ultimate question presented by this cause is whether the Congress intended to confer exclusive jurisdiction on the National Board. It is submitted that the considerations outlined above are conclusive indications of the congressional election to vest exclusive jurisdiction in the National Board.

The recent enactment of the Labor-Management Relations Act of 1947 serves to reinforce this conclusion. The new act contains specific provisions in a number of instances such as union security and the ceding of jurisdiction to state agencies where Congress wished to demonstrate its intention to permit the state agency to assert its power. In particular the Congress had a proviso added to Section 10(a) of the Act which reads as follows:

> "The Board is empowered by agreement with any agency of any State or Territory to cede to such agency

> jurisdiction over any cases in any industry (other than mining, manufacturing, communications and transportation except where predominantly local in character) even though such cases may involve labor disputes affecting commerce, unless the provision of the State or Territorial statute applicable to the determination of such cases by such agency is inconsistent with the corresponding provision of this Act or has received a construction inconsistent therewith."

This proviso is explained in the Senate Committee Report (80th Congress, First Session Senate Report No. 105) as follows:

> "The proviso which has been added to this subsection permits the National Board to allow State labor relations boards to take final jurisdiction of cases in border-line industries (*i.e.*, border line insofar as interstate commerce is concerned), provided the State statute conforms to national policy."

The language in the Act and the Senate Report serve as evidence of the congressional intent with respect to the relative jurisdiction of State and Federal agencies. This language also serves to point out the difficulties which are created by the ruling of the Supreme Court of Wisconsin in this case. Any enforcement proceeding brought for the purpose of securing compliance with the certification order of the Wisconsin State Labor Relations Board will be barred by the language of Section 10(a) since the Wisconsin State Act and the National Act, as amended, are now inconsistent in even more material respects than was the case in the original National Labor Relations Act. In particular eligible unions under the National Act gain the status of eligibility only upon compliance with certain specified requirements with respect to affidavits and financial reports. No such requirement is established by the Wisconsin Employment Peace Act. It would, therefore, seem clear that even under the ruling of the Supreme Court

of Wisconsin in this case that the State agency could not assert jurisdiction on a case by case basis before the National Board had acted, nor could the National Board cede jurisdiction to the State agency.

IV. Conclusion

It is, therefore, respectfully submitted that the State Act cannot properly be construed so as to confer upon the State Board jurisdiction over the State proceeding, because if the State Act should be so construed, it would be contrary to the provision of Section 8 of Article I and Clause 2 of Article VI of the Constitution of the United States. Accordingly, the judgment of the Supreme Court of Wisconsin entered December 23, 1947, here appealed from, should be reversed with directions to reinstate the order of the Circuit Court for La Crosse County, Wisconsin, reversing and setting aside the certification of a bargaining representation for the La Crosse Telephone Corporation issued by the Wisconsin Employment Relations Board on January 14, 1947, because the State Board does not have jurisdiction over the subject matter of the State Board proceeding.

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APPENDIX "A"

Pertinent Provisions of the Wisconsin Employment Peace Act

(Chapter 111 Sub-Chapter I of the Wisconsin Statutes, Secs. 111.01 to 111.09)

Sec. 111.02(6). The term "collective bargaining unit" shall mean all of the employees of one employer (employed within the state), except that where a majority of such employees engaged in a single craft, division, department or plant shall have voted by secret ballot as provided in Section 111.05 (2) to constitute such group a separate bargaining unit they shall be so considered, *provided, that in appropriate cases, and to aid in the more efficient administration of the employment peace act, the Board may find where agreeable to all parties affected in any way thereby an industry, trade or business comprising more than one employer in an association in any geographical area to be a "collective bargaining unit". A collective bargaining unit thus established by the Board shall be subject to all rights by termination or modification given by this Chapter 111 in reference to collective bargaining units otherwise established under said chapter.* Two or more collective bargaining units may bargain collectively through the same representative where a majority of the employees in each separate unit shall have voted by secret ballot as provided in Section 111.05-(2) so to do.

Sec. 111.05 Representatives and Elections.—(1) Representatives chosen for the purposes of collective bargaining by a majority of the employees voting in a collective bargaining unit shall be the exclusive representatives of all of the employees in such unit for the purposes of collective bargaining, provided that any individual employee or any minority group of employees in any collective bargaining unit shall have the right at any time to present grievances to their employer in person or through representatives of their own choosing, and the employer shall confer with them in relation thereto.

(2) Whenever a question arises concerning the determination of a collective bargaining unit as defined in Section 111.02(6), it shall be determined by secret ballot, and the Board, upon request, shall cause the ballot to be taken in such manner as to show separately the wishes of the employes in any craft, division, department or plant as to the determination of the collective bargaining unit.

(3) Whenever a question arises concerning the representation of employees in a collective bargaining unit the Board shall determine the representatives thereof by taking a secret ballot of employees and certifying in writing the results thereof to the interested parties and to their employer or employers. There shall be included on any ballot for the election of representatives the names of all persons submitted by an employee or group of employees participating in the election, except that the Board may, in its discretion, exclude from the ballot one who, at the time of the election stands deprived of his rights under this chapter by reason of a prior adjudication of his having engaged in an unfair labor practice. The ballot shall be so prepared as to permit of a vote against representation by anyone named on the ballot. The Board's certification of the results of any election shall be conclusive as to the findings included therein unless reviewed in the same manner as provided by subsection (8) of Section 111.07 for review of orders of the Board.

(3m) Whenever an election has been conducted pursuant to subsection (3) in which the name of more than one proposed representative appears on the ballot and results in no conclusion, the Board may, in its discretion, if requested by any party to the proceeding within 30 days from the date of the certification of the results of such election, conduct a run-off election. In such run-off election, the Board may drop from the ballot the name of the representative that received the least number of votes at the original election, or the privilege of voting against any representative when the least number of votes cast at the first election was against representation by any named representative.

APPENDIX "D"

Pertinent Provisions of the National Labor Relations Act

(Act of July 5, 1935 29 U.S.C. Secs. 151-166) and of the Labor Management Relations Act, 1947. (Act of June 23, 1947, Public Law 101, 80th Congress)

The pertinent provisions of the National Labor Relations Act include Secs. 2(6), 2(7) and 9. These sections are set forth below:

"2(6) The term "commerce" means trade, traffic, commerce, transportation, or communication among the several States, or between the District of Columbia or any Territory of the United States and any State or other Territory, or between any foreign country and any State, Territory, or the District of Columbia, or within the District of Columbia or any Territory, or between points in the same State but through any other State or any Territory or the District of Columbia or any foreign country.

"2(7) The term "affecting commerce" means in commerce, or burdening or obstructing commerce or the free flow of commerce, or having led or tending to lead to a labor dispute burdening or obstructing commerce or the free flow of commerce."

"9 Sec. 159. Representatives of employees for collective bargaining; determination of unit by Board; question affecting commerce, hearing; record on review where commerce questions involved.

"(a) Representatives designated or selected for the purposes of collective bargaining by the majority of the employees in a unit appropriate for such purposes, shall be the exclusive representatives of all the employees in such unit for the purposes of collective bargaining in respect to rates of pay, wages, hours of employment, or other conditions of employment: *Provided*, That any individual employee or a group of

employees shall have the right at any time to present grievances to their employer.

"(b) The Board shall decide in each case whether, in order to insure to employees the full benefit of their right to self-organization and to collective bargaining, and otherwise to effectuate the policies of Sections 151-166 of this title, the unit appropriate for the purposes of collective bargaining shall be the employer unit, craft unit, plant unit, or subdivision thereof.

"(c) Whenever a question affecting commerce arises concerning the representation of employees, the Board may investigate such controversy and certify to the parties, in writing, the name or names of the representatives that have been designated or selected. In any such investigation, the Board shall provide for an appropriate hearing upon due notice, either in conjunction with a proceeding under section 160 of this title or otherwise, and may take a secret ballot of employees, or utilize any other suitable method to ascertain such representatives.

"(d) Whenever an order of the Board made pursuant to section 160 (c) of this title is based in whole or in part upon facts certified following an investigation pursuant to subsection (c) of this section, and there is a petition for the enforcement or review of such order, such certification and the record of such investigation shall be included in the transcript of the entire record required to be filed under subsections 160 (e) or 160 (f) of this title, and thereupon the decree of the court enforcing, modifying, or setting aside in whole or in part the order of the Board shall be made and entered upon the pleadings, testimony, and proceedings set forth in such transcript.

The pertinent provisions of the Labor Management Relations Act, 1947 include Secs. 2(6), 2(7), 9 and 10(a). These sections are marked on the attached copy of the Act at pages 3 and 9 to 12.

[PUBLIC LAW 101—80TH CONGRESS]

[CHAPTER 120—1ST SESSION]

[H. R. 3020]

AN ACT

"(6) The term 'commerce' means trade, traffic, commerce, transportation, or communication among the several States, or between the District of Columbia or any Territory of the United States and any State or other Territory, or between any foreign country and any State, Territory, or the District of Columbia, or within the District of Columbia or any Territory, or between points in the same State but through any other State or any Territory or the District of Columbia or any foreign country.

"(7) The term 'affecting commerce' means in commerce, or burdening or obstructing commerce or the free flow of commerce, or having led or tending to lead to a labor dispute burdening or obstructing commerce or the free flow of commerce.

"Representatives and Elections

"SEC. 9. (a) Representatives designated or selected for the purposes of collective bargaining by the majority of the employees in a unit appropriate for such purposes, shall be the exclusive representatives of all the employees in such unit for the purposes of collective bargaining in respect to rates of pay, wages, hours of employment, or other conditions of employment: *Provided*, That any individual employee or a group of employees shall have the right at any time to present grievances to their employer and to have such grievances adjusted, without the intervention of the bargaining representative, as long as the adjustment is not inconsistent with the terms of a collective bargaining contract or agreement then in effect: *Provided further*,

That the bargaining representative has been given opportunity to be present at such adjustment.

"(b) The Board shall decide in each case whether, in order to assure to employees the fullest freedom in exercising the rights guaranteed by this Act, the unit appropriate for the purposes of collective bargaining shall be the employer unit, craft unit, plant unit, or subdivision thereof: *Provided*, That the Board shall not (1) decide that any unit is appropriate for such purposes if such unit includes both professional employees and employees who are not professional employees unless a majority of such professional employees vote for inclusion in such unit; or (2) decide that any craft unit is inappropriate for such purposes on the ground that a different unit has been established by a prior Board determination, unless a majority of the employees in the proposed craft unit vote against separate representation or (3) decide that any unit is appropriate for such purposes if it includes, together with other employees, any individual employed as a guard to enforce against employees and other persons rules to protect property of the employer or to protect the safety of persons on the employer's premises; but no labor organization shall be certified as the representative of employees in a bargaining unit of guards if such organization admits to membership, or is affiliated directly or indirectly with an organization which admits to membership, employees other than guards.

"(c) (1) Whenever a petition shall have been filed, in accordance with such regulations as may be prescribed by the Board—

"(A) by an employee or group of employees or any individual or labor organization acting in their behalf alleging that a substantial number of employees (i) wish to be represented for collective bargaining and that their employer declines to recognize their representative as the representative defined in section 9 (a), or (ii) assert that the individual or labor organization, which has been certified or is being currently recognized by their employer as the bargaining representative, is no longer a representative as defined in section 9 (a); or

"(B) by an employer, alleging that one or more individuals or labor organizations have presented to him a claim to be recognized as the representative defined in section 9 (a);

the Board shall investigate such petition and if it has reasonable cause to believe that a question of representation affecting commerce exists shall provide for an appropriate hearing upon due notice. Such hearing may be conducted by an officer or employee of the regional office, who shall not make any recommendations with respect thereto. If the Board finds upon the record of such hearing that such a question of representation exists, it shall direct an election by secret ballot and shall certify the results thereof.

"(2) In determining whether or not a question of representation affecting commerce exists, the same regulations and rules of decision shall apply irrespective of the identity of the persons filing the petition or the kind of relief sought and in no case shall the Board deny a labor organization a place on the ballot by reason of an order with respect to such labor organization or its predecessor not issued in conformity with section 10 (c).

"(3) No election shall be directed in any bargaining unit or any subdivision within which, in the preceding twelve-month period, a valid election shall have been held. Employees on strike who are not entitled to reinstatement shall not be eligible to vote. In any election where none of the choices on the ballot receives a majority, a run-off shall be conducted, the ballot providing for a selection between the two choices receiving the largest and second largest number of valid votes cast in the election.

"(4) Nothing in this section shall be construed to prohibit the waiving of hearings by stipulation for the purpose of a consent election in conformity with regulations and rules of decision of the Board.

"(5) In determining whether a unit is appropriate for the purposes specified in subsection (b) the extent to which the employees have organized shall not be controlling.

"(d) Whenever an order of the Board made pursuant to section 10 (c) is based in whole or in part upon facts certified following an investigation pursuant to subsection (e) of this section and there is a petition for the enforcement or review of such order, such certification and the record of such investigation shall be included in the transcript of the entire record required to be filed under section 10 (e) or 10 (f), and thereupon the decree of the court enforcing, modifying, or setting aside in whole or in part the order of the Board shall be made and entered upon the pleadings, testimony, and proceedings set forth in such transcript.

"(e) (1) Upon the filing with the Board by a labor organization, which is the representative of employees as provided in section 9 (a), of a petition alleging that 30 per centum or more of the employees within a unit claimed to be appropriate for such purposes desire to authorize such labor organization to make an agreement with the employer of such employees requiring membership in such labor organization as a condition of employment in such unit, upon an appropriate showing thereof the Board shall, if no question of representation exists, take a secret ballot of such employees, and shall certify the results thereof to such labor organization and to the employer.

"(2) Upon the filing with the Board, by 30 per centum or more of the employees in a bargaining unit covered by an agreement between their employer and a labor organization made pursuant to section 8 (a) (3) (ii), of a petition alleging they desire that such authority be rescinded, the Board shall take a secret ballot of the employees in such unit, and shall certify the results thereof to such labor organization and to the employer.

"(3) No election shall be conducted pursuant to this subsection in any bargaining unit or any subdivision within which, in the preceding twelve-month period, a valid election shall have been held.

"(f) No investigation shall be made by the Board of any question affecting commerce concerning the representation of employees, raised by a labor organization under subsection (c) of this section, no petition under section 9 (c)

(f) shall be entertained, and no complaint shall be issued pursuant to a charge made by a labor organization under subsection (b) of section 10, unless such labor organization and any national or international labor organization of which such labor organization is an affiliate or constituent unit (A) shall have prior thereto filed with the Secretary of Labor copies of its constitution and bylaws and a report, in such form as the Secretary may prescribe, showing—

"(1) the name of such labor organization and the address of its principal place of business;

"(2) the names, titles, and compensation and allowances of its three principal officers and of any of its other officers or agents whose aggregate compensation and allowances for the preceding year exceeded $5,000, and the amount of the compensation and allowances paid to each such officer or agent during such year;

"(3) the manner in which the officers and agents referred to in clause (2) were elected, appointed, or otherwise selected;

"(4) the initiation fee or fees which new members are required to pay on becoming members of such labor organization;

"(5) the regular dues or fees which members are required to pay in order to remain members in good standing of such labor organization;

"(6) a detailed statement of, or reference to provisions of its constitution and bylaws showing the procedure followed with respect to, (a) qualification for or restrictions on membership, (b) election of officers and stewards, (c) calling of regular and special meetings, (d) levying of assessments, (e) imposition of fines, (f) authorization for bargaining demands, (g) ratification of contract terms, (h) authorization for strikes, (i) authorization for disbursement of union funds, (j) audit of union financial transactions, (k) participation in insurance or other benefit plans, and (l) expulsion of members and the grounds therefor;

and (B) can show that prior thereto it has—

"(1) filed with the Secretary of Labor, in such form as the Secretary may prescribe, a report showing all of (a) its receipts of any kind and the sources of such receipts, (b) its total assets and liabilities as of the end of its last fiscal year, (c) the disbursements made by it during such fiscal year, including the purposes for which made; and

"(2) furnished to all of the members of such labor organization copies of the financial report required by paragraph (1) hereof to be filed with the Secretary of Labor.

"(g) It shall be the obligation of all labor organizations to file annually with the Secretary of Labor, in such form as the Secretary of Labor may prescribe, reports bringing up to date the information required to be supplied in the initial filing by subsection (f) (A) of this section, and to file with the Secretary of Labor and furnish to its members annually financial reports in the form and manner prescribed in subsection (f) (B). No labor organization shall be eligible for certification under this section as the representative of any employees, no petition under section 9 (e) (1) shall be entertained, and no complaint shall issue under section 10 with respect to a charge filed by a labor organization unless it can show that it and any national or international labor organization of which it is an affiliate or constituent unit has complied with its obligation under this subsection.

"(h) No investigation shall be made by the Board of any question affecting commerce concerning the representation of employees, raised by a labor organization under subsection (c) of this section, no petition under section 9 (e) (1) shall be entertained, and no complaint shall be issued pursuant to a charge made by a labor organization under subsection (b) of section 10, unless there is on file with the Board an affidavit executed contemporaneously or within the preceding twelve-month period by each officer of such labor organization and the officers of any national or international labor organization of which it is an affiliate or con-

stituent unit that he is not a member of the Communist Party or affiliated with such party, and that he does not believe in, and is not a member of or supports any organization that believes in or teaches, the overthrow of the United States Government by force or by any illegal or unconstitutional methods. The provisions of section 35 A of the Criminal Code shall be applicable in respect to such affidavits.

"Prevention of Unfair Labor Practices

"SEC. 10. (a) The Board is empowered, as hereinafter provided, to prevent any person from engaging in any unfair labor practice (listed in section 8) affecting commerce. This power shall not be affected by any other means of adjustment or prevention that has been or may be established by agreement, law, or otherwise: *Provided*, That the Board is empowered by agreement with any agency of any State or Territory to cede to such agency jurisdiction over any cases in any industry (other than mining, manufacturing, communications, and transportation except where predominantly local in character) even though such cases may involve labor disputes affecting commerce, unless the provision of the State or Territorial statute applicable to the determination of such cases by such agency is inconsistent with the corresponding provision of this Act or has received a construction inconsistent therewith.

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Supreme Court of the United States

OCTOBER TERM, 1948.

No. 38

LA CROSSE TELEPHONE CORPORATION,
Appellant,
vs.
WISCONSIN EMPLOYMENT RELATIONS BOARD, L. E. GOODING, HENRY RULE AND J. E. FITZGIBBON, AS MEMBERS OF THE WISCONSIN EMPLOYMENT RELATIONS BOARD.

No. 39

INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, LOCAL B-953, A. F. OF L.,
Appellant,
vs.
WISCONSIN EMPLOYMENT RELATIONS BOARD, L. E. GOODING, HENRY RULE AND J. E. FITZGIBBON, AS MEMBERS OF THE WISCONSIN EMPLOYMENT RELATIONS BOARD.

APPEAL FROM THE SUPREME COURT OF THE STATE OF WISCONSIN.

BRIEF OF APPELLANT LA CROSSE TELEPHONE CORPORATION.

THOMAS H. SKEMP,
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Counsel for Appellant La Crosse Telephone Corporation.

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APPEAL FROM THE SUPREME COURT OF THE STATE OF WISCONSIN.

BRIEF OF APPELLANT LA CROSSE TELEPHONE CORPORATION.

OPINIONS BELOW.

The opinion of the Wisconsin Employment Relations Board of the State of Wisconsin (R. 17) is unreported.

The opinion of the Circuit Court of LaCrosse County, Wisconsin, 6th Judicial Circuit, is unreported.

The opinion of the Supreme Court of the State of Wisconsin (R. 48) written by Mr. Justice Fritz, is reported in Volume 251 Wis. 583; 30 N. W. (2) 241.

JURISDICTION.

The jurisdiction of this court is invoked under Section 237 (a) of the Judicial Code.

QUESTION PRESENTED.

Does the National Labor Relations Act, as enacted by Congress in 1937, preclude the Wisconsin Employment Relations Board from conducting an election to determine the desires of employees of a local telephone corporation with respect to a collective bargaining representative, irrespective of whether the National Labor Relations Board has ever taken any action involving the company and its employees, and irrespective of whether the action of the State Board contravenes any substantive provisions of the National Act or any fixed policy of the National Board.

STATUTES INVOLVED.

The statutes involved are:

1. Wisconsin Employment Relations Act, also denominated "Employment Peace Act", ch. 111 Wisconsin Statutes 1945 (Wisconsin Laws of 1939 Ch. 57 as amended by c. 515 s. 17 Laws of 1939; 48.08 (2); 1947 c. 2).

2. The National Labor Relations Act (Act. of July 5, 1935, c. 372, 49 Stats. 449, 29 U. S. C. Sec. 151 *et seq.*).

The pertinent provisions of each statute are attached as appendices A and B to this brief.

STATEMENT.

The facts which give rise to the issue here presented are as follows:

A petition was filed by the Telephone Guild, affiliated with the National Federation of Telephone Workers (hereinafter referred to as the Guild) with the National Labor Relations Board (hereinafter referred to as the National Board) at Minneapolis, Minnesota, alleging that a question of representation affecting commerce had arisen in the employer-employee relations of the LaCrosse Telephone Corporation (hereinafter referred to as the Company). This petition was filed on September 20, 1946. Eighteen days later, on October 8, 1946, the Guild also filed a petition with the Wisconsin Employment Relations Board (hereinafter referred to as State Board) requesting an election among the employees of the LaCrosse Telephone Corporation for the purpose of determining what, if any, representation such employees desired for the purpose of collective bargaining. On October 18, 1946, the State Board took jurisdiction and conducted a hearing at LaCrosse, Wisconsin, pursuant to the petition of the Guild. On November 27, 1946, the State Board directed that an election be held within 30 days and filed a memorandum decision (R. 17). In order to determine whether or not an election should be held, it was necessary for the State Board to pass upon the legal effect of a contract which the Company had with its employees, who were then affiliated with the International Brotherhood of Electrical Workers. The Company contended that the contract was a bar to the holding of an election since by the terms of the contract it was not to expire for over a period of a year and, though subject to amendment, by reason of the employees' request for amendment pursuant to its terms, such amend-

ments had been fully agreed upon between the company and the employees at the time the Guild's petition was filed with the National Board. In the memorandum decision filed by the State Board, the State Board found against the contention of the Company and its memorandum decision held, that the collective bargaining agreement which the company had with its employees (members of the International Brotherhood of Electrical Workers) was by its terms to expire on December 1, 1946, since amendments thereto had not formally received the Union's approval, and the Company notified of such approval until September 26 and 27, 1946, which was some seven days after the Guild filed its petition with the National Board and three days after notice of this petition was mailed to the company. The State Board concluded that there was a collective bargaining agreement from September 27, 1946 to December 1, 1947, but that there was no binding agreement on September 24, 1946, when the notice of the petition of the Guild was sent to the company by the National Board, in which petition the Guild claimed to represent a majority of the employees that the International Brotherhood of Electrical Workers then claimed to represent.

Pursuant to the provisions of the Wisconsin Statutes (Sec. 111.07 (8)) the Company petitioned the Circuit Court for LaCrosse County, Wisconsin, for a review of the decision of the State Board and contended that the decisions, orders and certifications of the State Board were without its jurisdiction, in excess of its statutory authority, erroneous as a matter of law, and contrary to the constitutional rights and privileges of the company (R. 2) in that the matter was under the jurisdiction of the National Labor Board. This petition for review in the Circuit Court for LaCrosse County, Wisconsin, came on for hearing before the Hon. R. S. Cowie, Circuit Judge for the Circuit Court in and for LaCrosse County, Wisconsin. Briefs were filed

and oral arguments had. The court took the matter under advisement and during the interim and before handing down a decision the Supreme Court of the United States, on April 7, 1947, decided the issues in the case of *Bethlehem Steel Company et al., appellants* v. *New York State Labor Relations Board* and the *Alleghany Ludlum Steel Corporation, appellant* v. *Kelly Steel*, constituting the State Labor Relations Board of the State of New York (330 U. S. 767-797, 91 L. Ed. 1234).

This decision was immediately brought to the attention of Judge Cowie by counsel for the appellants and on April 28, 1947, the court filed a memorandum decision (R. 1) in which the court held that the issues before the court were governed by the decision of the Supreme Court of the United States in the *Bethlehem* case, and that decision left no constitutional authority in the State Board to determine collective bargaining units, and to conduct collective bargaining elections among employees, whose employers are engaged in inter-state Commerce (R. 1). Pursuant to this memorandum decision, judgment was entered by the La-Crosse Telephone Corporation, reversing and setting aside the certification, decision and order made and entered by the Wisconsin Employment Relations Board.

The State Board appealed from the judgment of the Circuit Court of LaCrosse County, Wisconsin, to the Supreme Court of the State of Wisconsin pursuant to the provisions of the Wisconsin Statutes (R. 44). The State Board contended that the National Labor Relations Act did not preclude the State Board from conducting an election to determine representation of the employees of the LaCrosse Telephone Corporation, "irrespective of whether the National Board had ever taken any action involving its employees, and irrespective of whether the action of the State Board contravenes any substantive provisions of the National Act, or any fixed policy of the National Board."

The LaCrosse Telephone Corporation contended that the decision of the Circuit Judge should be sustained and that the State Board had no jurisdiction in representation proceedings between the employees and employer of the LaCrosse Telephone Corporation, since the company was engaged in Inter-state Commerce, and that under Article I Section 8 and Article VI of the Constitution of the United States and by virtue of the decision in the *Bethlehem Steel* case, the State Board was without jurisdiction to conduct an election among its employees, and furthermore, was without jurisdiction to adjudge that no contract existed between the company and its employees.

The Supreme Court of the State of Wisconsin reviewed the judgment of the Circuit Court of LaCrosse County and held that the State Board had jurisdiction to conduct an election to determine bargaining representatives for the employees of the LaCrosse Telephone Corporation and that such jurisdiction existed irrespective of whether the National Labor Relations Board had ever taken any action involving the company and its employees, and irrespective of whether the action of the State Board contravenes any substantive provisions of the National Act, or any fixed policy of the National Board and rejected the contention of the appellants that in Article I Section 8 and Article VI, Clause 2 of the Constitution of the United States the National Board had exclusive jurisdiction over the questions dealt with in the State Board proceedings (R. 48).

Appeals were taken to this court in both the *LaCrosse Telephone Corporation* and the *International Brotherhood of Electrical Workers Local B-953* cases. It was stipulated to consolidate the cases for purposes of briefing, argument, consideration, and decision (R. 47) and that there should be one transcript of record (R. 68). This court on April 19, 1948 entered an order postponing further consideration of the question of jurisdiction until such time as the cases could be heard on the merits (R. 71).

SPECIFICATION OF ERRORS TO BE URGED.

1. The Supreme Court of Wisconsin erred in reversing and setting aside the decision of the Circuit Court for LaCrosse County, Wisconsin, made and entered in this cause on May 5, 1947, and adjudging that a certification made by the Wisconsin Employment Relations Board of the election of the Telephone Guild of Wisconsin as a bargaining representative for employees of the Telephone Corporation was valid and within the jurisdiction of the Wisconsin Employment Relations Board under the Wisconsin Employment Peace Act.

2. The Supreme Court of Wisconsin erred in holding that under the provisions of Section 8 of Article I and Paragraph Two of Article VI of the Constitution of the United States, the Wisconsin Employment Peace Act can legally be applied to the issue of determining the bargaining representative for employees where the employer is engaged in interstate commerce;

3. The Supreme Court of the State of Wisconsin erred in holding that under the provisions of Section 8 Article I and Paragraph Two of Article VI of the Constitution of the United States, the Wisconsin Employment Relations Board has jurisdiction to determine the contract rights of employer and employee where the employer is engaged in interstate commerce.

4. The Supreme Court of Wisconsin erred in not applying the decision of the Supreme Court of the United States in the case of the *Bethlehem Steel Company, et al.* v. *New York State Labor Relations Board* and *Alleghany Ludlum Steel Corporation* v. *William J. Kelly, et al.*, 330 U. S. 767, 67 Sup. Ct. 1026, 91 L. Ed. 1054.

5. The Supreme Court of Wisconsin erred in holding that the Wisconsin Employment Relations Board has jurisdiction over employer-employee relations of the LaCrosse Telephone Corporation arising out of the question of choice of units of representation for bargaining purposes, irrespective of whether the National Labor Relations Board has ever taken any action involving the company and its employees, and irrespective of whether the action of the State Board contravenes any substantive provisions of the National Act or any fixed policy of the National Board.

SUMMARY OF ARGUMENT.

The issue in this case is stated in the decision of the Supreme Court of the State of Wisconsin as follows:

> "Does the National Labor Relations Act preclude the Wisconsin Employment Relations Board from conducting an election to determine the desires of employees of the local (LaCrosse) Telephone Corporation (found by the court to be 'rendering in connection therewith such intra state and interstate long distance service as is incidental thereto') with respect to a collective bargaining representative, irrespective of whether the National Labor Relations Board has ever taken any action involving the company and its employees, and irrespective of whether the action of the State Board contravenes any substantive provisions of the National Act, or any fixed policy of the National Board?" (R. 49).

Appellant Company concedes that this is the issue to be determined on this appeal. This appeal therefore presents a very narrow question, the determination of which is important in the administration of labor relations in the State of Wisconsin, and to settle the confusion that now exists by reason of the conflicting interpretations now being given

to the issue of jurisdiction under the National Labor Relations Act.

Appellants contend on this appeal:

1. The decision of the Wisconsin Supreme Court in this case is in conflict with the decision of the Supreme Court of the United States in the *Bethlehem Steel* case (330 U. S. 767).

2. The decision of the Wisconsin Supreme Court in this case is in conflict with the decision of the Supreme Court of the United States in the *Allen Bradley* case (315 U. S. 750) wherein a jurisdictional question under the Wisconsin Employment Relations Statute was at issue.

3. The Wisconsin Supreme Court has consistently adhered to the rule of "joint jurisdiction" and "case by case" determination of the jurisdictional issue in disputes involving employment relations.

4. By the Taft-Hartley Amendment to the National Labor Relations Act Congress has in effect approved the decision of the Supreme Court of the United States in the *Bethlehem* case, since by this amendment this interpretation was not changed, and furthermore, provision for "ceding" jurisdiction under certain conditions was authorized.

5. The Wisconsin Supreme Court erred in this case in adjudging that the State Board had jurisdiction to determine contract rights of the employees and the Company where the employer was engaged in a business affecting interstate commerce.

We shall discuss each of the above contentions in the order outlined.

ARGUMENT.

I.

THE DECISION OF THE WISCONSIN SUPREME COURT IN THIS CASE IS IN CONFLICT WITH THE DECISION OF THE SUPREME COURT OF THE UNITED STATES IN THE BETHLEHEM STEEL CASE.

The irreconcilable conflict of the decision of the Wisconsin Supreme Court in the case at bar and the decision of this Court in the *Bethlehem Steel* case is demonstrated by comparing quotations from these cases on the same issues.

Wisconsin Supreme Court.	United States Supreme Court.
1. "That although the National Board's power over that subject is paramount, it is not exclusive in such a case as we have here, until the Federal power is exercised or jurisdiction thereto is taken as to particular employees."	1. "The *Companies* contend that the National Board's jurisdiction over their labor relations is exclusive of said power; the *State* contends on the contrary that while Federal power over the subject is paramount, it is not exclusive and in such a case as we have here until the Federal power is actually exercised as to the particular employees, State power may be exercised. "*The State argues for a rule that would enable it to act until the Federal Board had acted in the same case.*"
2. "The State Board's action, which is under consideration on these appeals, does not involve the exercise of its discretion, nor the formulation of any policy which does not, or could vary from the National Labor Relations Act."	2. "Comparison of the State and Federal Statutes will show that both governments have laid hold of the same relationship for regulation and involves the same employers and the same employees. Each has delegated to an administrative authority, a wide discretion in applying this plan of regulation to specific

WISCONSIN SUPREME COURT.

UNITED STATES SUPREME COURT.

cases, and they are governed by somewhat different standards. Thus if both laws are upheld, two administrative bodies are asserting a discretionary control over the same subject matter, conducting hearings, supervising elections and determining appropriate units for bargaining in the same plant. They might come out with the same determination, or they might come out with conflicting ones as they have in the past. Cf. *Re Creamery Package Mfg. Co.*, 34 NLRB (f) 108; Wis. Emp. Rel. Bd. case III No. 348 E-117. But the power to decide a matter can hardly be made dependent on the way it is decided. As said by Mr. Justice Holmes for the Court, 'When Congress has taken the particular subject matter in hand coincidence is as ineffective as opposition * * * If the two boards attempt to exercise a concurrent jurisdiction to decide the appropriate unit of representation, action by one necessarily denies the discretion of the other. The second to act either must follow the first, which would make its action useless and vain, or depart from it, which would produce a mischievous conflict. The State argues for a rule that would enable it to act until the Federal Board had acted in the same case. But we do not think that a case by case test of Federal supremacy is permissible here.'

Although it might be argued that the majority opinion of this Court in the *Bethlehem* case leaves some doubt as to the import of the Court's decision on the issue of jurisdiction, appellant contends that the separate opinion of

Justice Frankfurter in that case indicates clearly that this Court adjudicated that the National Labor Relations Act gives exclusive jurisdiction to the National Board within the field covered by Congress in the act, and even though the National Board had there ceded certain jurisdiction to the New York State Board, a situation which we do not have in the case at bar. The language of Justice Frankfurther, concurred in by Justices Murphy and Rutledge is as follows:

> "The court's opinion carries at least overtones of meaning that, regardless of the consent of the National Board, New York is excluded from enforcing rights of collective bargaining, in all industries within its border as to which Congress has granted opportunity to enforce the authority of the National Board."
>
> *Bethlehem Steel Company, et al.* v. *New York State Labor Relations Board*, 330 U. S. 767, 778.

Because the issue before the Wisconsin Supreme Court was so unequivocally stated by that court, it appears to appellants that it is unnecessary for an adjudication of the issue here to analyze in detail the similarities and dissimilarities of the Wisconsin Employment Relations Act and the National Labor Relations Act.

That there are similarities and differences is well stated by counsel for the respondent in an article written by her and published in the Wisconsin Law Review, 1946, p. 193, which is of significance in that the author of that article is the representative of the Wisconsin Attorney General's Department who must represent the Wisconsin Employment Relations Board in appeals taken from the State Board's decision, including the case at bar. The following are a few excerpts from that article:

> "Both Boards are given the further function of facilitating the bargaining process by ascertaining as a fact what is an appropriate bargaining unit and

who or what is the chosen bargaining representative of employees in such a unit, *although there are substantial differences in the extent of the powers of the two Boards and in the procedural requirements.*" (Page 194.)

"The points in which the Wisconsin Employment Peace Act departs from the scheme of the National Labor Relations Act represents a distinct difference in philosophy as to what practices need to be prevented for the avoidance of industrial conflicts. This difference in philosophy is apparent in the very first provision of the two laws containing their declarations of policy." (Page 195.)

Wisconsin Law Review, 1946.

For the determination of the issues here presented, it is sufficient to say that both acts provide for the choosing of bargaining representatives of employees and grant to the boards created by the two acts jurisdiction to decide representation matters. Under the Wisconsin Act the Wisconsin Supreme Court contends for state jurisdiction under all circumstances until the National Board has taken jurisdiction—"irrespective of whether the action of the State Board contravenes any substantive provisions of the National Act or any fixed policy of the National Board." In the case at bar the Wisconsin Supreme Court held:

"Although the National Board's power over that subject is paramount, it is not exclusive in such a case as we have here until the Federal power is exercised, or jurisdiction thereto is taken as to particular employees" (R. 55).

Appellants contend that the issue on this appeal is the same as the issue in the Bethlehem case, excepting that in the Bethlehem case the State of New York Board had been ceded jurisdiction by the National Labor Relations Board over certain industries and had been given concurrent jurisdiction over others. There is no arrangement of such a character between the National Board and the Wisconsin

State Board. There are therefore, more cogent reasons for applying the law of the *Bethlehem* case to the case at bar than there were in the *Bethlehem* case.

It is therefore submitted (1) that the *Bethlehem Steel* case squarely decides that a State Labor Board has no jurisdiction in a situation such as is presented at bar, and (2) that, therefore, the decision of the Wisconsin Supreme Court here on this appeal must be reversed.

II.

THE DECISION OF THE WISCONSIN SUPREME COURT IN THIS CASE IS IN CONFLICT WITH THE DECISION OF THE SUPREME COURT OF THE UNITED STATES IN THE ALLEN-BRADLEY CASE WHEREIN A JURISDICTIONAL QUESTION UNDER THE WISCONSIN EMPLOYMENT RELATIONS STATUTE WAS AT ISSUE.

The case of *Allen-Bradley Local 1111, United Electrical Radio and Machine Workers, et al., Appellants* v. *Wisconsin Employment Relations Board, and Allen-Bradley Company, Respondents*, 315 U. S. 740, 86 L. Ed. 1154, 237 Wis. 164, 295 N. W. 791 (1941) is important and significant on this appeal because in that case the Wisconsin Employment Relations Statute and the National Labor Relations Act were before this Court for decision of the jurisdictional question involved. This Court resolved the issues in the *Allen-Bradley* case in favor of state jurisdiction and upheld the Wisconsin Supreme Court on the narrow ground, that the State, under its police power,—even though the industry was engaged in interstate commerce—had there the right to regulate employees' conduct in labor relations, since the matter of employee regulation was without the scope of the National Labor Relations Act. Therefore the National Labor Relations Board neither had nor could take jurisdiction of the issue in that case. The United States Supreme Court did not pass upon the validity of the Wisconsin law

as a whole but only upon that portion which authorized the State Board to issue such an order as was there entered prohibiting mass picketing and other employee conduct. This Court held that the mere fact that it was contended that other portions of the act were invalid since they were incompatible and hostile to the policy expressed in the Federal Act, nevertheless, since the State Act provided for severability, should its constitutionality be attacked, this Court would not consider the portions of the State Act which were not then before it.

The Allen-Bradley decision by this Court was a forewarning to the Wisconsin Supreme Court. The following language of the Supreme Court of the United States in the *Allen-Bradley* case is significant on this issue of conflict of jurisdiction:

> "If the order of the State Board affected the status of the employees, or if it caused a forfeiture of the collective bargaining rights, a distinctly different question would arise."
>
> *Allen-Bradley Local 1111 United Electrical Radio and Machine Workers, et al.* v. *Wisconsin Employment Relations Board and Allen Bradley Company*, 315 U. S. 740, 751.

III.

THE WISCONSIN SUPREME COURT HAS CONSISTENTLY ADHERED TO THE RULE OF "JOINT JURISDICTION" AND "CASE BY CASE" DETERMINATION OF THE JURISDICTIONAL ISSUE IN DISPUTES INVOLVING EMPLOYMENT RELATIONS.

The rule of "case by case" determination and the right of "dual jurisdiction" as announced by the Wisconsin Supreme Court in the case at bar is consistent with the previous holdings of that court in all of its decisions since the enactment of the Wisconsin Employment Relations Act.

The Wisconsin court first considered this question of State-Federal jurisdiction in the case of *Wisconsin Labor Board* v. *Fred Reuping L. Co.*, 228 Wis. 473; 279 N. W. 673 (1938). In that case the court said:

> "We see no reason to anticipate and determine when and under what circumstances the State Board is ousted of jurisdiction."

The court has adhered to that rule in each of its subsequent cases.

Hotel and R. E. I. Alliance v. *Wis. E. R. Board*, 236 Wis. 329, 294 N. W. 632, 295 N. W. 634 (1941).

Allen-Bradley Local 1111 v. *Wis. E. R. Board*, 237 Wis. 164; 295 N. W. 791 (1941).

Christoffel v. *Wis. E. R. Board*, 243 Wis. 332, 10 N. W. 2d 194 (1943).

International Union Etc. v. *Wis. E. R. Board*, 245 Wis. 417, 14 N. W. 2d 872 (1944).

International B. of E. W. v. *Wis. E. R. Board*, 245 Wis. 532, 15 N. W. 2d 832 (1944).

Public S. E. Union v. *Wis. E. R. Board*, 246 Wis. 190, 16 N. W. 2d 823 (1944).

Since a complete survey of the facts and decisions in these Wisconsin cases is not necessary for a decision in the case at bar, reference is made to them, however, to show the consistent policy of the Wisconsin Supreme Court.

By reason of these consistent holdings of the Wisconsin Supreme Court on the issue of jurisdiction—which that Court has now re-affirmed and even enlarged upon by its decision in the case at bar—we now have in Wisconsin a chaotic condition in the administration of employer-employee relationships with no rule. The Wisconsin Court has now stated clearly that it is committed to the rule of "case by case determination" and dual jurisdiction "Irre-

spective of whether the National Labor Relations Board has taken jurisdiction and irrespective of whether the actions of the State Board contravene any substantive provisions of the National Act or any fixed policy of the National Board.". The net result is that we now have in Wisconsin a situation where employers and employees have a "choice of forum" and the right "to shop around" between State and Federal jurisdiction in order to determine the jurisdiction most advantageous to the interests of the parties. We are confronted with the practical problem foreseen by this Court in the *Bethlehem* case in the following language:

> "Thus if both laws are upheld, two administrative bodies are asserting a discretionary control over the same subject matter, conducting hearings, supervising elections, and determining appropriate units for bargaining in the same plant. They might come out with the same determination, or they might come out with conflicting ones as they have in the past."
>
> *Bethlehem Steel Company, et al.* v. *New York State Labor Relations Board*, 330 U. S. 767, 775.

To further illustrate the confusion that exists on this question of jurisdiction, we call this Court's attention to a decision of the Supreme Court of Pennsylvania in the case of *Pittsburgh Railways Co.* v. *Division 85 of Amalgamated Association of Street Electric Railway and Motor Coach Employees of America*, 357 Penna. 379, 54 Atl. 2d 891, decided September 29, 1947.

The issue in that case was the question of the jurisdiction of the Pennsylvania Labor Relations Board to determine the appropriate unit for the purpose of collective bargaining. The Pennsylvania court in its opinion found that the Pittsburgh Railways "is admittedly engaged in interstate commerce within the meaning of the National Labor Relations Act". In the Pennsylvania case the court heard a re-

argument of the issues "because of the possible effect of the decision of the Supreme Court of the United States in the *Bethlehem Steel Company* case—upon the question of jurisdiction in the present case." The court then went on to analyze the holding of the United States Supreme Court in the *Bethlehem* case and used the following significant language:

> "The subject matter of the instant dispute does not constitute or represent 'a separable or distinct segment of the matter covered by the Federal Statute' nor can it be said 'that the Federal Agency has not acted on that segment'—Congress, having exercised its power, did not intend to permit state action with regard thereto—the clear implication of the decision of the Supreme Court of the United States in the Bethlehem Steel case—is that wherever the employer-employee relationship is one over which Congress has the power of regulation and with regard to which Congress has acted, State Power is suspended and can not constitutionally be exercised. To permit the exercise of state power in such circumstances would effectively negative the supremacy of Congressional Legislature."

The Court then concluded:

> "The criterion to determine validity of the exercise of State Power is not whether the agency administering Federal Law has acted upon the relationship in a given case; rather, it is whether Congress has asserted its power to regulate that relationship."
>
> *Pittsburgh Railways Co.* v. *Division 85 of Amalgamated Association of Street Electric Railway and Motor Coach Employees of America*, 357 Penna 379, 54 Atl. 2d 891, 896.

From the foregoing decision it is very apparent that the Pennsylvania Supreme Court has arrived at a conclusion on the issue of jurisdiction directly opposed to that of the conclusion arrived at by the Wisconsin Supreme Court in

the case at bar. The importance of an adjudication of an established principle for future guidance of employer-employee relationship is thus apparent.

IV.

BY THE TAFT-HARTLEY AMENDMENT TO THE NATIONAL LABOR RELATIONS ACT, CONGRESS HAS APPROVED THE DECISION OF THE SUPREME COURT OF THE UNITED STATES IN THE BETHLEHEM CASE, SINCE BY THIS AMENDMENT THIS INTERPRETATION WAS NOT CHANGED AND, FURTHERMORE, A PROVISION FOR "CEDING" JURISDICTION UNDER CERTAIN CONDITIONS WAS AUTHORIZED.

The Taft-Hartley Act amendments to the National Labor Relations Act affirm the adjudication of this Court in the *Bethlehem Steel* case that Congress intended that the National Labor Relations Board has exclusive jurisdiction in the field of Labor Relations in matters affecting commerce. This is true because:

A. Congress enacted the amendments to the National Labor Relations Act after the decision of this Court in the *Bethlehem* case and, since no Congressional action was taken to the contrary, it must be assumed that Congress affirmed and approved the ruling of this Court in the *Bethlehem* case.

B. The Taft-Hartley Act amendments to the National Labor Relations Act provide for ceding jurisdiction to state agencies in limited and defined fields where the state statute is no inconsistent with the National Act, thereby implying intent that there shall be exclusive Federal Jurisdiction excepting only as specifically "ceded".

C. The Report of Congress while considering the Taft-Hartley amendments show Congressional intent of exclusive Federal Jurisdiction.

A.

Congress Enacted the Amendments to the National Labor Relations Act After the Decision of This Court in the Bethlehem Case and, Since No Congressional Action Was Taken to the Contrary, It Must Be Assumed That Congress Affirmed and Approved the Ruling of This Court in the Bethlehem Case.

It is a well settled rule of law that where a statute, that has been construed by the court of last resort, has been re-enacted in the same or substantially the same terms, the legislature is presumed to have been familiar with the construction and adopted it as a part of the law unless a contrary intent clearly appears. In the case of *Heald* v. *District of Columbia*, 41 S. Ct. 42, 254 U. S. 20, 65 L. Ed. 106, this court stated the rule as follows:

> "Where provisions of a statute had previous to their re-enactment, a settled significance, that meaning will continue to attach to them in the absence of plain implication to the contrary."

B.

The Taft-Hartley Act Amendments to the National Labor Relations Act Provide for Ceding Jurisdiction to State Agencies in Limited and Defined Fields Where the State Statute Is Not Inconsistent With the National Act, Thereby Implying Congressional Intent of Federal Jurisdiction Excepting Only as Specifically "Ceded".

The Taft-Hartley Act amendments to the National Labor Relations Act provides for the "ceding" of jurisdiction as follows:

> "That the Board is empowered by agreement with any agency of any State or Territory to cede to such agency jurisdiction over any cases in any industry (other than mining, manufacturing, communications,

and transportation except where predominantly local in character) even though such cases may involve labor disputes affecting commerce, unless the provisions of the State or Territorial statute applicable to the determination of such cases by such agency is inconsistent with the corresponding provision of this subchapter or has received a construction inconsistent therewith."

Title 29, Sec. 160 (a) U. S. C.

By this amendment Congress has made provision for the ceding of partial jurisdiction to the states by the National Board. This provision would have been unnecessary if the State Board already had such jurisdiction. Excepting for the limited jurisdiction ceded the balance of the National Board's power, by implication, was retained in the National Board. In the passage of the Taft-Hartley amendments, Congress had the opportunity to alter the court's construction of the National Labor Relations Act in the *Bethlehem* case. Congress chose not to do so but to enact amendments in other particulars. This evidences a clear legislative intent to ratify the construction placed upon the statute by this court in the *Bethlehem* case. The following rulings of this court apply:

"Moreover Congress in the first of these decisions has permitted the clause as it now appears—to stand—this is pursuasive evidence of the adoption by that body of the judicial construction."

State of Missouri v. *Ross*, 299 U. S. 72, 57 S. Ct. 60.

"It is true that the silence of Congress when it has authority to speak may sometimes give rise to an implication as to the Congressional purpose."

Graves v. *New York*, 206 U. S. 466, 59 S. Ct. 595.

C.

The Report of Congress While Considering the Taft-Hartley Amendments Show Congressional Intent of Exclusive Federal Jurisdiction.

The Congressional Report of Section 10 (2) Title 29 Par. 160 (a) of the amended National Labor Relations Act supports the construction of the Act which denied state jurisdiction of the subject matter touched upon by the act, unless otherwise expressly provided. This is confirmed by the pertinent provisions of a Report of the House Committee on Education and Labor which contained the following:

> "The board is empowered as hereinafter provided, to adjudicate complaints of unfair labor practices affecting commerce filed by the administrator. Such power of the Board shall be exclusive."
>
> H. R. 3020 Sec. 10 (2).

The committee indicated that it thought the "exclusive" jurisdiction which would thereby be given to the board necessitated a special provision giving the states "a concurrent jurisdiction in respect to closed shop and other union security arrangements" and it referred to the act as an "illustration of the policy calling for uniformity in matters of national policy under the commerce clause." It said that "since the National Act Congress pre-empts the field that the act covers insofar as commerce within the meaning of the act is concerned" the saving provision was necessary."

> House Reports 205, 80th Congress, First Session, pp. 40-44 (Apr. 11, 1947).

The Senate Committee Report referred to the section briefly and said that the provision was added to permit the National Labor Relations Board "to allow state labor

relations boards to take final jurisdiction of cases in borderline industries (that is, borderline insofar as interstate commerce is concerned) provided the state statute conforms to national policy."

S. 1126 Sec. 10 (a).

The senate provisions as originally reported used the language "to concede to such agency jurisdiction." When finally adopted after the conference report the word "concede" was changed to "cede." Concede and cede are not precisely synonimous, although each can be construed to mean "surrendering" or "granting." The word "cede" is restricted to this meaning. The word "concede" can have the additional meaning "to acknowledge." (See Webster's International Dictionary, Second Edition). It seems significant therefore that Congress should use the word "cede" in [illegible]ating its intent was to retain jurisdiction in the national Board.

V.

THE WISCONSIN SUPREME COURT ERRED IN THIS CASE IN ADJUDGING THAT THE STATE BOARD HAD JURISDICTION TO DETERMINE CONTRACT RIGHTS OF THE EMPLOYEES AND THE COMPANY WHERE THE EMPLOYER WAS ENGAGED IN A BUSINESS AFFECTING INTERSTATE COMMERCE.

Before assuming jurisdiction of the representation issue in this case, it was necessary for the State Board to adjudicate the issue as to whether or not there was a contract between the company and its employees. This issue involved a complex factual and legal question. The company maintained that there was a contract and that such a contract was a bar to the determination of the representation issue by the State Board. In deciding this issue the State Board held that it had jurisdiction of the contract question and made findings of fact and conclusions of law.

to the effect that there was no binding contract which operated as a bar to their taking of jurisdiction of the representation issue. The Wisconsin Supreme Court upheld the findings and conclusions of the State Board.

In presenting this issue before the Wisconsin Supreme Court the State Board contended that this adjudication by it was a ministerial act without legal force. The company contended that the act was not ministerial but judicial in character and had legal force because failure to comply with it resulted in an unfair labor practice charge and the attending results of being enjoined by judicial proceedings. The Wisconsin Court upheld the State Board's contention and resolved this issue in the following language:

> "The mere fact-finding procedure of the State Board in the ascertainment of facts, and its thereupon ordering and conducting an election and certifying the result thereof, constitutes action in merely its ministerial capacity" (R. 55).

The attempt to justify the State Board's decision in this case by calling its acts "ministerial" rather than "judicial" does not change the import of the State Board's action. This court took cognizance of procedures of this character by administrative boards in the *Bethlehem* case where the court stated as follows:

> "Thus, if both laws are upheld, two administrative bodies are asserting a discretionary control over the same subject matter—if the two boards attempt to exercise a concurrent jurisdiction to decide the appropriate unit of representation, action by one necessarily denies the discretion of the other."
>
> *Bethlehem Steel Company, et al.* v. *New York State Labor Relations Board*, 330 U. S. 767, 775.

The administration of either the State Act or the National Act calls for the exercise of judgment and discretion

by the board both in finding the facts and in determining the orders to be entered. Different administrative agencies will arrive at different conclusions. This was the case in Creamery Package Manufacturing Company, 34 N. L. R. B. (f) 108; Wisconsin Employment Relations Board, Case 3 No. 348 E-117 referred to by Justice Jackson in the Bethlehem decision. After stating the issue it was decided by this Court in the *Bethlehem* case with this language:

> "But the power to decide the matter can hardly be dependent upon the way it is decided."
>
> *Bethlehem Steel Company, et al.* v. *New York State Labor Relations Board*, 330 U. S. 767, 775.

Thus, in the final analysis the issue is essentially that of jurisdiction. If the State Board had no jurisdiction, it is irrelevant to argue that its action was merely ministerial. Whether ministerial or judicial, it has usurped power in a field which Congress has exclusively granted to the National Labor Relations Board. Any exercise of judgment and discretion by the State Board infringes upon the jurisdiction of the National Board. Congress imposed that discretion and judgment in the National Board alone. The State Board's determination here was without its jurisdiction and void.

Conclusion.

For the reasons set forth, it is respectfully submitted that the judgment of the Wisconsin Supreme Court should be reversed.

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APPENDIX A.

Pertinent Provisions of the New York State Labor Relations Act.

The pertinent provisions of the National Labor Relations Act (Act of July 5, 1935, 49 Stat. 449, 29 U. S. C. 151 *et seq.*) are as follows:

SECTION 1. The denial by employers of the right of employees to organize and the refusal by employers to accept the procedure of collective bargaining lead to strikes and other forms of industrial strife or unrest, which have the intent or the necessary effect of burdening or obstructing commerce by (a) impairing the efficiency, safety, or operation of the instrumentalities of commerce; (b) occurring in the current of commerce; (c) materially affecting, restraining, or controlling the flow of raw materials or manufactured or processed goods from or into the channels of commerce, or the prices of such materials or goods in commerce; or (d) causing diminution of employment and wages in such volume as substantially to impair or disrupt the market for goods flowing from or into the channels of commerce.

The inequality of bargaining power between employees who do not possess full freedom of association or actual liberty of contact, and employers who are organized in the corporate or other forms of ownership association substantially burdens and affects the flow of commerce, and tends to aggravate recurrent business depressions, by depressing wage rates and the purchasing power of wage earners in industry and by preventing the stabilization of competitive wage rates and working conditions within and between industries.

Experience has proved that protection by law of the right to employees to organize and bargain collectively safeguards commerce from injury, impair-

ment, or interruption, and promotes the flow of commerce by removing certain recognized sources of industrial strife and unrest, by encouraging practices fundamental to the friendly adjustment of industrial disputes arising out of differences as to wages, hours, or other working conditions, and by restoring equality of bargaining power between employers and employees.

It is hereby declared to be the policy of the United States to eliminate the causes of certain substantial obstructions to the free flow of commerce and to mitigate and eliminate these obstructions when they have occurred by encouraging the practice and procedure of collective bargaining and by protecting the exercise by workers of full freedom of association, self-organization, and designation of representatives of their own choosing, for the purpose of negotiating the terms and conditions of their employment or other mutual aid or protection.

SEC. 2. When used in this Act—

(2) The term "employer" includes any person acting in the interest of an employer, directly or indirectly, but shall not include the United States, or any State or political subdivision thereof, or any person subject to the Railway Labor Act, as amended, from time to time, or any labor organization (other than when acting as an employer), or anyone acting in the capacity of officer or agent of such labor organization.

(3) The term "employee" shall include any employee, and shall not be limited to the employees of a particular employer, unless the Act explicitly states otherwise, and shall include any individual whose work has ceased as a consequence of, or in connection with any current labor dispute or because of any unfair labor practice, and who has not obtained any other regular and substantially equivalent employment, but shall not include any individual employed as an agricultural laborer, or in the domestic service of any family or person at his home, or any individual employed by his parent or spouse.

(6) The term "commerce" means trade, traffic, commerce, transportation, or communication among the several States, or between the District of Columbia or any Territory of the United States and any State or other Territory, or between any foreign country and any State, Territory, or the District of Columbia, or within the District of Columbia or any Territory, or between points in the same State but through any other State or any Territory or the District of Columbia or any foreign country.

(7) The term "affecting commerce" means in commerce, or burdening or obstructing commerce or the free flow of commerce, or having led or tending to lead to a labor dispute burdening or obstructing commerce or the free flow of commerce.

* * * * * * *

SEC. 4. (a)

* * * * * * *

The Board may establish or utilize such regional, local, or other agencies, and utilize such voluntary and uncompensated services, as may from time to time be needed.

* * * * * * *

SEC. 7. Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in concerted activities, for the purpose of collective bargaining or other mutual aid or protection.

SEC. 8. It shall be an unfair labor practice for an employer—

(1) To interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7.

(2) To dominate or interfere with the formation or administration of any labor organization or contribute financial or other support to it: *Provided*, That subject to rules and regulations made and published by the Board pursuant to section 6 (a), an employer shall not be prohibited from permitting employees to confer

with him during working hours without loss of time or pay.

(3) By discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization: *Provided*, That nothing in this Act, or in the National Industrial Recovery Act (U. S. C., Supp. VII, title 15, secs. 701-712), as amended from time to time, or in any code or agreement approved or prescribed thereunder, or in any other statute of the United States, shall preclude an employer from making an agreement with a labor organization (not established, maintained, or assisted by any action defined in this Act as an unfair labor practice) to require, as a condition of employment membership therein, if such labor organization is the representative of the employees as provided in section 9 (a), in the appropriate collective bargaining unit covered by such agreement when made.

(4) To discharge or otherwise discriminate against an employee because he has filed charges or given testimony under this Act.

(5) To refuse to bargain collectively with the representatives of his employees, subject to the provisions of Section 9 (a).

* * * * *

SEC. 9. (a) Representatives designated or selected for the purposes of collective bargaining by the majority of the employees in a unit appropriate for such purposes, shall be the exclusive representatives of all the employees in such unit for the purposes of collective bargaining in respect to rates of pay, wages, hours of employment, or other conditions of employment: *Provided*, That any individual employee or a group of employees shall have the right at any time to present grievances to their employer.

(b) The Board shall decide in each case whether, in order to insure to employees the full benefit of their right to self-organization and to collective bargaining, and otherwise to effectuate the policies of this Act, the

unit appropriate for the purposes of collective bargaining shall be the employer unit, craft unit, plant unit, or subdivision thereof.

(c) Whenever a question affecting commerce arises concerning the representation of employees, the Board may investigate such controversy and certify to the parties, in writing, the name or names of the representatives that have been designated or selected. In any such investigation, the Board shall provide for an appropriate hearing upon due notice, either in conjunction with a proceeding under section 10 or otherwise, and may take a secret ballot of employees, or utilize any other suitable method to ascertain such representatives.

* * * * *

SEC. 10. (a) The Board is empowered, as hereinafter provided, to prevent any person from engaging in any unfair labor practice (listed in section 8) affecting commerce. This power shall be exclusive, and shall not be affected by any other means of adjustment or prevention that has been or may be established by agreement, code, law, or otherwise.

* * * * *

SEC. 14. Wherever the application of the provisions of section 7 (a) of the National Industrial Recovery Act (U. S. C., Supp. VII, title 15, sec. 707 (a)), as amended from time to time, or of section 77B, paragraphs (l) and (m) of the Act approved June 7, 1934, entitled "An Act to amend an Act entitled 'An Act to establish a uniform system of bankruptcy throughout the United States' approved July 1, 1898, and Acts amendatory thereof and supplementary thereto" (48 Stat. 922, pars. (l) and (m)), as amended from time to time, or of Public Resolution Numbered 44, approved June 19, 1934 (48 Stat. 1183), conflicts with the application of the provisions of this Act, this Act shall prevail: *Provided*, That in any situation where the provisions of this Act cannot be validly enforced, the provisions of such other Acts shall remain in full force and effect.

APPENDIX B.

The pertinent provisions on this appeal of the Wisconsin Employment Relations Act, also denominated the Employment Peace Act (Wisconsin Statutes, 1945, Chapter 111) are as follows:

SUBCHAPTER I.

EMPLOYMENT PEACE ACT.

111.01 *Declaration of policy.* The public policy of the state as to employment relations and collective bargaining, in the furtherance of which this subchapter is enacted, is declared to be as follows:

(1) It recognizes that there are three major interests involved, namely: That of the public, the employe, and the employer. These three interests are to a considerable extent interrelated. It is the policy of the state to protect and promote each of these interests with due regard to the situation and to the rights of the others.

(2) Industrial peace, regular and adequate income for the employe, and uninterrupted production of goods and services are promotive of all of these interests. They are largely dependent upon the maintenance of fair, friendly and mutually satisfactory employment relations and the availability of suitable machinery for the peaceful adjustment of whatever controversies may arise. It is recognized that certain employers, including farmers and farmer cooperatives, in addition to their general employer problems, face special problems arising from perishable commodities and seasonal production which require adequate consideration. It is also recognized that whatever may be the rights of disputants with respect to each other in any controversy regarding employment relations, they should not be permitted, in the conduct of their controversy, to intrude directly into the primary rights of third parties to earn

a livelihood, transact business and engage in the ordinary affairs of life by any lawful means and free from molestation, interference, restraint or coercion.

(3) Negotiations of terms and conditions of work should result from voluntary agreement between employer and employe. For the purpose of such negotiation an employe has the right, if he desires, to associate with others in organizing and bargaining collectively through representatives of his own choosing, without intimidation or coercion from any source.

(4) It is the policy of the state, in order to preserve and promote the interests of the public, the employe, and the employer alike, to establish standards of fair conduct in employment relations and to provide a convenient, expeditious and impartial tribunal by which these interests may have their respective rights and obligations adjudicated. While limiting individual and group rights of aggression and defense, the state substitutes processes of justice for the more primitive methods of trial by combat. [1939 c. 57; 43.08 (2)]

* * * * *

111.02 *Definitions.* When used in this chapter:

* * * * *

(2) The term "employer" means a person who engages the services of an employe, and includes any person acting on behalf of an employer within the scope of his authority, express or implied, but shall not include the state or any political subdivision thereof, or any labor organization or anyone acting in behalf of such organization other than when it is acting as an employer in fact.

* * * * *

(4) the term "representative" includes any person chosen by an employe to represent him.

* * * * *

(6) The term "collective bargaining unit" shall mean all of the employes of one employer (employed within the state), except that where a majority of such employes engaged in a single craft, division, department or plant shall have voted by secret ballot as provided in section 111.05 (2) to constitute such group a separate bargaining unit they

shall be so considered, provided, that in appropriate cases, and to aid in the more efficient administration of the employment peace act, the board may find, where agreeable to all parties affected in any way thereby, an industry, trade or business comprising more than one employer in an association in any geographical area to be a "collective bargaining unit". A collective bargaining unit thus established by the board shall be subject to all rights by termination or modification given by this subchapter I of chapter 111 in reference to collective bargaining units otherwise established under said subchapter. Two or more collective bargaining units may bargain collectively through the same representative where a majority of the employes in each separate unit shall have voted by secret ballot as provided in section 111.05 (2) so to do.

111.05. *Representatives and elections.* (1) Representatives chosen for the purposes of collective bargaining by a majority of the employes voting in a collective bargaining unit shall be the exclusive representatives of all of the employes in such unit for the purposes of collective bargaining, provided that any individual employe or any minority group of employees in any collective bargaining unit shall have the right at any time to present grievances to their employer in person or through representatives of their own choosing, and the employer shall confer with them in relation thereto.

(2) Whenever a question arises concerning the determination of a collective bargaining unit as defined in section 111.02 (6), it shall be determined by secret ballot, and the board, upon request, shall cause the ballot to be taken in such manner as to show separately the wishes of the employes in any craft, division, department or plant as to the determination of the collective bargaining unit.

(3) Whenever a question arises concerning the representation of employes in a collective bargaining unit the board shall determine the representatives thereof by taking a secret ballot of employes and certifying in writing the results thereof to the interested parties and to their employer or employers. There shall be included on any ballot

for the election of representatives the names of all persons submitted by an employe or group of employes participating in the election, except that the board may, in its discretion, exclude from the ballot one who, at the time of the election, stands deprived of his rights under this subchapter by reason of a prior adjudication of his having engaged in an unfair labor practice. The ballot shall be so prepared as to permit of a vote against representation by anyone named on the ballot. The board's certification of the results of any election shall be conclusive as to the findings included therein unless reviewed in the same manner as provided by subsection (8) of section 111.07 for review of orders of the board.

(4) Questions concerning the determination of collective bargaining units or representation of employes may be raised by petition of any employe or his employer (or the representative of either of them). Where it appears by the petition that any emergency exists requiring prompt action, the board shall act upon said petition forthwith and hold the election requested within such time as will meet the requirements of the emergency presented. The fact that one election has been held shall not prevent the holding of another election among the same group of employes, provided that it appears to the board that sufficient reason therefor exists. [1939 c. 57; 1939 c. 515 s. 7; 43.08 (2)]

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In the Supreme Court of the United States

OCTOBER TERM, 1948

No. 39.

INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, LOCAL B-953, A. F. OF L., APPELLANT

vs.

WISCONSIN EMPLOYMENT RELATIONS BOARD, ET AL.

ON APPEAL FROM THE SUPREME COURT OF WISCONSIN

BRIEF FOR APPELLANT

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OCTOBER TERM, 1948

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WISCONSIN EMPLOYMENT RELATIONS BOARD, ET AL.

ON APPEAL FROM THE SUPREME COURT OF WISCONSIN

BRIEF FOR APPELLANT

OPINIONS BELOW

The opinion of the Circuit Court of La Crosse County, Wisconsin, has been reported in 12 C.C.H. Labor Cases, Par. 63,795 (1947). The decision of the Supreme Court of Wisconsin (R. 48) reversing the decision of the Circuit Court has been reported in 251 Wis. 583, 30 N.W. (2d) 541 (1947).

JURISDICTION

The final judgment of the Supreme Court of Wisconsin, review of which is here sought, was entered December 24, 1947 (R. 58-59). The petition for appeal was presented and the appeal was allowed on February 25, 1948 (R. 63-66).

The statutory provisions sustaining the jurisdiction of this appeal by the Supreme Court of the United States are contained in Section 237(a) of the United States Judicial Code, as amended by the Act of January 31, 1928 (Act of Feb. 13, 1925, Ch. 229 Sec. 1, 43 Stat. 937; Act of January 31, 1928, Ch. 14 Sec. 1, 45 Stat. 54).

QUESTIONS PRESENTED

1) Does the Supreme Court of the United States have jurisdiction over this appeal.

2) Does the National Labor Relations Board have power over questions of representation of employees of La Crosse Telephone Corporation and, if the National Board has such power, is it exclusive.

THE STATUTE INVOLVED

The Statute of the State of Wisconsin, the validity of which is involved is the Wisconsin Employment Peace Act (Wisconsin Statutes (1945 ed.) Chapter 111, Sub-chapter I, Secs. 111.01 to 111.19, pp. 1795 to 1806). The pertinent provisions of this statute are set forth in Appendix A hereto. The pertinent provisions of the National Labor Relations Act, as amended, are set forth in Appendix B hereto.

STATEMENT

This case arose as the result of the Petition filed on October 8, 1946, by the Telephone Guild of Wisconsin for an election among the employees of La Crosse Telephone Corporation of La Crosse, Wisconsin, to determinne the bargaining representative for such employees (R. 19).

The La Crosse Telephone Corporation is a Wisconsin corporation operating a telephone service in La Crosse Country and handling local and long distance calls in connection therewith (R. 2, 49). The Corporation is located in the city of La Crosse (population 42,707)[1] and renders service to approximately 15,000 subscribers in La Crosse

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[1] *1940 Census.*

County (R. 35). The city is on the Mississippi River, which at that point is the boundary between the states of Wisconsin and Minnesota. The county of La Crosse is adjacent to the state of Minnesota.[2] La Crosse Telephone Corporation is a subsidiary of Central Telephone Company which is the parent corporation of other telephone companies operating in Illinois, Virginia and other states (R. 23). The Park Ridge District in Illinois is operated from the La Crosse office (R. 24).

A hearing was held on the petition of the Telephone Guild at La Crosse by the Wisconsin Employment Relations Board on October 18, 1946. The Corporation and International Brotherhood of Electrical Workers, Local B-953 A. F. of L. objected to the Requested Direction of Election on a number of grounds, including the contention that the Corporation and International Brotherhood of Electrical Workers, Local B-953 A. F. of L. were parties to a binding collective bargaining agreement which served as a bar to the petition (R. 18-38). On November 27, 1946, the Wisconsin Employment Relations Board entered and filed a Direction of Election (R. 15-18) and pursuant to such Direction the Board conducted an election for bargaining representatives on December 17, 1946, following which the Wisconsin Employment Relations Board on January 14, 1947, certified the Guild as the exclusive collective bargaining representative for all employees in the Traffic and Plant Departments, excluding executive and supervisory employees (R. 12-15).

Prior to the filing of the petition for certification of representatives with the State Labor Relations Board, the Guild filed a petition for certification as a bargaining representative with the National Labor Relations Board on September 20, 1946 (R. 18). On October 8, 1946, the same day that the Guild filed its petition with the State Board, the Guild requested the National Labor Relations Board to

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[2] *Rand McNally Standard Map of Wisconsin; Peyroux v Howard et al.*, 7 Pet. 324.

approve a withdrawal of its petition to that Board (R. 19, 51).

On February 7, 1947, International Brotherhood of Electrical Workers, Local B-953 A. F. of L. filed with the Circuit Court of La Crosse County a petition for review of the certification of bargaining representatives by the Wisconsin Employment Relations Board in this case under Sections 111.05(3) and 111.07(8) of the Wisconsin Statutes. This petition contended that the decisions, orders and certifications of the Wisconsin Employment Relations Board were contrary to the constitutional rights and privileges of the petitioner in that Chapter 111 of the Wisconsin Statutes had been so construed and applied as to bring it into conflict with the National Labor Relations Act and Article I, Section 8, and Article VI of the Constitution of the United States; that the Wisconsin Employment Relations Board had no jurisdiction over the subject matter for the reason that the National Labor Relations Board had previously undertaken to exercise the jurisdiction which the National Labor Relations Act conferred upon it and has not, insofar as the record discloses, relinquished such jurisdiction; that the decision and order of the Wisconsin Employment Relations Board affected the status of the employees of the La Crosse Telephone Corporation and caused a forfeiture of collective bargaining rights guaranteed to the petitioner under the National Labor Relations Act and that the certification made by the Wisconsin Employment Relations Board was in excess of its statutory authority and jurisdicton because the La Crosse Telephone Corporation is engaged in interstate commerce and the question of the representation of its employees is, therefore, a matter within the jurisdiction of the National Labor Relations Board under the National Labor Relations Act (R. 6-10).

Judge Cowie of the Circuit Court of La Crosse County after considering the arguments in the case came to the conclusion that the decision of the Supreme Court of the United States in *Bethlehem Steel Company, et al.* v. *New York State Labor Relations Board* and *Allegheny Ludlum*

Steel Corporation v. *William J. Kelley et al.*, 330 U.S. 767, leaves no constitutional authority in the Wisconsin Employment Relations Board to determine collective bargaining units and to conduct collective bargaining elections among employees or employers engaged in interstate commerce and referred to the admission that the La Crosse Telephone Corporation is so engaged in interstate commerce (R. 1-2).

This decision was rendered on April 28, 1947, and judgment was thereafter entered reversing and setting aside the certification of a bargaining representative made on January 14, 1947, by the Wisconsin Employment Relations Board for employees of the La Crosse Telephone Corporation (R. 11-12).

The Wisconsin Employment Relations Board appealed through the Attorney General of the State of Wisconsin, to the Supreme Court of Wisconsin from the judgment of the Circuit Court of La Crosse County (R. 45-46).

The Supreme Court of Wisconsin in a decision rendered December 23, 1947, reversed the judgment of the Circuit Court and remanded the cause with directions to enter judgments in accordance with its opinion which sustained the State Board's direction of election and its certification of the Guild (R. 48-59). The Supreme Court of Wisconsin ruled that the National Labor Relations Board has paramount power over the subject of bargaining representatives, but that such power is not exclusive in the instant case until the federal power is exercised or jurisdiction is taken as to particular employees. The Supreme Court of Wisconsin was also of the view that the decision of the Supreme Court of the United States in *Bethlehem Steel Company* v. *New York State Labor Relations Board, supra,* did not require a ruling in this case that the state Board is without jurisdiction (R. 55).

The present appeal was then taken. On April 19, 1948 an order was entered postponing further consideration of the question of jurisdiction to the hearing of the case on the merits (R. 71).

SPECIFICATION OF ERRORS TO BE URGED

The Supreme Court of Wisconsin erred:

I. In rejecting the contention of appellant that the question or controversy over which the Wisconsin Employment Relations Board sought to assert jurisdiction under the Wisconsin Employment Peace Act in the proceeding before said Board in which was issued the certification of a bargaining representative is a question or controversy exclusively within the jurisdiction of the National Labor Relations Board under the National Labor Relations Act, and is not within the jurisdiction of the Wisconsin Relations Board under the Wisconsin Employment Peace Act.

II. In failing and refusing to hold that the Wisconsin Employment Peace Act cannot have any lawful application to the aforesaid question or controversy under the provisions of Section 8 of Article I and Clause 2 of Article 6 of the Constitution of the United States.

III. In failing and refusing to follow the applicable decision of the Supreme Court of the United States in the case of the *Bethlehem Steel Company, et al.* v. *New York State Labor Relations Board* and *Allegheny Ludlum Steel Corporation* v. *William J. Kelley, et al., supra.*

SUMMARY OF ARGUMENT

I

The Supreme Court of the United States has jurisdiction of this appeal under section 237(a) of the Judicial Code. The Supreme Court of Wisconsin has rendered a final judgment upholding the application of the Wisconsin Employment Peace Act by the Wisconsin Labor Relations Board to a question of representation affecting commerce which is under the exclusive jurisdiction of the National

Labor Relations Board. The Wisconsin Court has thereby rendered a decision which draws in question the validity of a state statute on the grounds of repugnance to the Constitution or laws of the United States.

The assumption of jurisdiction by this Court in the case of *Allegheny Ludlum Steel Corporation* v. *Kelley et al.*, 330 U.S. 767 demonstrates that the instant case is a proper subject for the assumption of jurisdiction. Here, as in the *Allegheny Ludlum Steel Corporation* case, the constitutionality of the application of the state act has been challenged by a method adequate under the state law to raise the question and the judgment of the lower court is final. The court judgment from which this appeal has been taken has fully determined legal rights of the parties. The certification of a bargaining representative, although it does not command action, for all practical purposes determines legal rights as effectively as the judgment of a court.

II

The National Labor Relations Board under the Wagner Act had exclusive jurisdiction of questions of representation affecting commerce. This court in the case of *Bethlehem Steel Company et al.* v. *New York State Labor Relations Board*, 330 U.S. 767 has in general rejected the doctrine of concurrent jurisdiction to decide the appropriate unit or representation. In particular this court has rejected the contention that a state board may act until the federal board has acted in the same case. The adoption of section 10(a) of the Labor-Management Relations Act of 1947 shows what the Congress considers to be a reasonable solution to the problem of adjusting state and federal authority in the labor relations field. Congress has recognized the exclusive jurisdiction of the National Board and has provided for cession of such jurisdiction by the board under certain conditions and if the procedure of agreement between the state and national administrative agencies is followed. Recent decisions of all lower courts,

with the exception of the Supreme Court of Wisconsin, have denied concurrent jurisdiction in the state boards in cases of representation affecting commerce.

III

A. The La Crosse Telephone Corporation is an instrumentality of interstate commerce and is, therefore, subject to the jurisdiction of the National Board. The corporation operates in a city of 42,000, located on the boundary line of Wisconsin and Minnesota, and services 15,000 subscribers in a county adjacent to the state line. The Circuit Court of La Crosse County, Wisconsin made its decision denying jurisdiction in the State Board on the basis of the admission that the La Crosse Telephone Corporation is engaged in interstate commerce. This finding was not disturbed by the Supreme Court of Wisconsin which assumed in its opinion that questions of representation of employees of this company would be within the jurisdiction of the National Labor Relations Board. It is clear from the record that the corporation is handling interstate telephone calls as part of its service. The National Board has asserted jurisdiction in other cases involving telephone companies of the same status and character of La Crosse Telephone Corporation. These decisions have been uniformly upheld by U. S. Circuit Courts of Appeals which have ruled that telephone companies are engaged in interstate commerce within the meaning of the Act regardless of the fact that the long distance calls handled by such companies constituted only a small percentage of the total messages handled.

B. The jurisdiction of the National Labor Relations Board over questions of representation of employees of La Crosse Telephone Corporation is exclusive. Even if the policies of the Wisconsin and Federal Labor Relations Acts were parallel on questions of representation, the State Board would not have concurrent jurisdiction in this case. The Supreme Court of the United States has rejected the view that the National Board's power is not exclusive until

the federal power is exercised, which is the basis of the decision by the Supreme Court of Wisconsin. The fact, however, is that the policies of the Wagner and Wisconsin Employment Peace Acts on questions of representation are inconsistent. Thus, the certification in the instant case excluded supervisory employees under the provisions of the Wisconsin Act defining an "employee" as including "any person, other than an individual contractor, working for another for hire in the State of Wisconsin in a non-executive or non-supervisory capacity." It is apparent that even if the effort to limit the doctrine of the *Bethlehem Steel Company* case were accepted, the National Board's jurisdiction in this case is exclusive of state power because the policy of the Wisconsin Act under which administrative action was taken, conflicted with the policy of the National Act.

ARGUMENT

I. THE SUPREME COURT OF THE UNITED STATES HAS JURISDICTION TO REVIEW UPON THIS APPEAL THE FINAL JUDGMENT OF THE SUPREME COURT OF WISCONSIN.

The jurisdiction of this Court has been invoked by this appeal under section 237(a) of the Judicial Code. It is our view that in this case there is drawn in question the validity of a statute of the state of Wisconsin on the ground of its being repugnant to the Constitution or laws of the United States and that the final judgment here sought to be reviewed of the Supreme Court of Wisconsin, that being the highest court in the State of Wisconsin in which a decision in this case could be had, is in favor of the validity of the state statute involved.

The propriety of this Court's assumption of jurisdiction in this case is demonstrated by the procedural aspects of the *Allegheny Ludlum Steel Corp. Case, supra.* There, a petition for certification was filed with the New York State Labor Relations Board by the Foremen's Association on December 30, 1943 (*Allegheny Ludlum Steel Corporation* v. *Kelley et al.*, Transcript of Record in the Supreme

Court of the United States, Oct. Term 1946 no. 76, Filed April 3, 1946, p. 59) and on April 14, 1944 the Company filed an action with the Supreme Court of New York, County of Chautauqua, seeking a declaratory judgment that the State Board did not have jurisdiction to hold the election because the National Board had exclusive jurisdiction (Ibid p. 41) and praying for an injunction to restrain the State Board from proceeding to determine a bargaining representative for the foremen (Ibid p. 59). The State Board, thereafter, on May 24, 1944 issued its Decision and Direction of Election (Ibid p. 41). The election was held on or about June 21, 1944 and the Board found that the majority of eligible foremen who voted in the election chose the Foremen's Association to be their representative (Ibid p. 47). On July 28, 1944, the New York Supreme Court in Chautauqua County dismissed the Company's complaint on the merits (Ibid p. 59). Thereafter, the Company appealed unsuccessfully through the various state courts which affirmed the judgment of the lower court. The Company appealed to the Supreme Court of the United States after judgment had been entered by the Supreme Court of Chautauqua County on the judgment and remittitur of the highest appellate court in New York, the Court of Appeals of New York (Ibid p. 71). The Supreme Court of the United States noted probable jurisdiction on April 22, 1946 (Ibid p. 79) and accepted the appeal and decided the case in its opinion rendered April 7, 1947 (330 U.S. 767).

The differences between the facts raising the jurisdictional question in the *Allegheny Ludlum Steel Corp.* case and the instant case are not material. There, the constitutional issue was raised by an action for declaratory judgment and injunction. Here, the constitutional issue has been raised by a petition for review of the order of certification which was brought under Sections 111.05(3) and 111.07(8) of the Wisconsin Statutes (R. 2). In both cases, the constitutionality of the application of the State

Acts was challenged by methods adequate under the respective State laws to raise the question.

In the *Allegheny Ludlum Steel Corp.* case the appeal was taken from the judgment entered by the New York Supreme Court in Chautauqua pursuant to the judgment and order of remittitur of the Court of Appeals of New York. Here, the appeal was taken from the judgment entered by the Supreme Court of Wisconsin reversing the judgment of the Circuit Court of La Crosse County and remanding the cause with directions to enter judgment accordingly (R. 57). In both cases the judgments appealed from were final. This Court has ruled that a judgment is considered as final in the court below and appealable to this court where the judgment of the appellate court has fully determined the rights of the parties, so that there is nothing remaining to be done by the trial court except the ministerial act of entering the judgment which the appellate court directed. *Department of Banking* v. *Pink*, 317 U.S. 264, 267.

It is entirely clear that the judgment of the Supreme Court of Wisconsin affirming the validity of the certification, in addition to being final, adjudicated the legal rights of the parties. A certification of a bargaining representative by a government agency establishes legal rights and relationships. This Court has been careful to point out that the denial of direct judicial review of certifications of the National Board is based on the language of the National Act and its legislative history on the limitation of subjects for such review. *American Federation of Labor* v. *N.L.R.B.*, 308 U.S. 401. The legal character of a certification was described as follows: "In analyzing the provisions of the statute in order to ascertain its true meaning, we attribute little importance to the fact that the certification itself does not command action. Administrative determinations which are not commands may for all practical purposes determine rights as effectively as the judgment of a court, and may be re-examined by courts under particular statutes providing for the review of 'orders'." (*American Federation of Labor* v. *N.L.R.B.*, *supra*, p. 408;

See *Columbia Broadcasting System* v. *U.S.*, 316 U.S. 407, 418, 425).

It is also our view that the questions involved in this appeal are substantial. The reasons supporting our view on this point are set out in this Brief pp. 19-26, *infra*, and our Statement as to Jurisdiction.

II. THE NATIONAL LABOR RELATIONS BOARD HAS EXCLUSIVE JURISDICTION OVER QUESTIONS OF REPRESENTATION AFFECTING COMMERCE.

Many complex questions raised by the relationship of state and federal administrative agencies in the field of selection of representatives of employees for collective bargaining purposes have been resolved by this Court in the cases of *Bethlehem Steel Co., et al.*, v. *N. Y. State Labor Relations Board* and *Allegheny Ludlum Steel Corp.* v *Kelley et al.*, 330 U.S. 767.

The facts in these cases were as follows: In 1944, the State Labor Relations Board of the State of New York entertained petitions of foremen for election and certification of representatives for bargaining units of foremen employed by the Bethlehem and Allegheny Ludlum Steel Companies. The petitions were filed at a time when the National Board refused to recognize bargaining units of foremen as "appropriate" under the National Act. Prior to the decision of this Court the National Board changed its position and was following a policy similar to that of the State Board in recognizing such units. The companies operated manufacturing plants in New York which were subject to the jurisdiction of the National Board under the rule of *N.L.R.B.* v. *Jones and Laughlin Steel Corp.*, 301 U.S. 1.

The State and National Boards had entered into an agreement July 12, 1937 establishing a system of "clearing" doubtful cases and providing that in certain named industries the State Board would assume jurisdiction without clearance. The document of agreement stated that:

"The position was repeatedly expressed by the representatives of both National and State Boards that as a working matter the jurisdiction of the two Boards must be allotted on the basis of the type of industry or business involved (*rather, for example, than on the basis of which Board a petition or charge is initially filed with*), and that when one Board, *pursuant to common understanding,* has asserted jurisdiction in the past over a particular employer, the other Board should thereafter refer any matter coming to it to the Board which had entertained the earlier case or cases." *Bethlehem Steel Co. et al.* v. *N. Y. State Labor Relations Board, supra,* pp. 788, 789.

It was further stated in this document that "even a tentative understanding" of concurrent jurisdiction must await mutual study of a memorandum then in process of preparation.

On April 20, 1945 a conference of officials of the State and National Boards was held to discuss the problem of respective jurisdiction of the Boards and, in particular, the matter of petitions for foremen's units since the decision of the National Board allowing the organization of such units in the *Packard* case, 61 N.L.R.B. 4 (1945). After discussion of the appropriate lines of demarcation of jurisdiction over certain named industries, the conference turned to the question of concurrent jurisdiction.

It appeared that the memorandum which was to have been the subject of mutual study after the 1937 agreement, was never prepared and no subsequent understanding had been reached as to concurrent jurisdiction. The Federal representatives pointed to the recent decision in the *Packard* case and suggested leaving all cases involving large manufacturing establishments doing interstate business to the National Board. "The impracticability of both Boards intermittently asserting jurisdiction over the same employers was emphasized . . ." (*Bethlehem Steel Co., supra;* p. 793).

After further discussion of the important obligations of the New York Board in the matter of the maintenance

of industrial peace within the boundaries of New York, the representatives of the New York Board agreed "that their officials should not reach out for cases of this character, involving large interstate manufacturers." (Ibid. p. 794). No broad understanding was reached in this matter, however, and the issue was left open "both Boards reserving their respective positions with regard to petitions for unions of supervisory employees and *other petitions* involving large interstate manufacturers." (Ibid. p. 794).

This Court concluded that it was beyond the power of New York State to apply its policy to the companies in these cases.

The Court referred to the unsettled state of the law on foremen's units at the time the Courts of the State of New York were considering the matter which was not resolved until the decision of *Packard Motor Car Co.* v. *N.L.R.B.*, 330 U.S. 485 and stated that "Whatever constitutional issue may have been presented by earlier phases of the evolution of Federal policy in relation to that of the State, the question now is whether, Congress having undertaken to deal with the relationship between these companies and their foremen, the State is prevented from doing so" *Bethlehem Steel Co. et al.* v. *N. Y. State Labor Relations Board*, 330 U.S. 767, 771.

The Court went on to state that "Comparison of the State and Federal statutes will show that both governments have laid hold of the same relationship for regulation and it involves the same employers and the same employees. . . . If the two boards attempt to exercise a concurrent jurisdiction to decide the appropriate unit of representation, action by one necessarily denies the discretion of the other. The second to act either must follow the first, which would make the action useless and vain, or depart from it, which would produce a mischievous conflict. The State argues for a rule that would enable it to act until the Federal Board had acted in the same case. But we do not think that a case by case test of federal

supremacy is permissible here. The Federal Board has jurisdiction of the industry in which these particular employers are engaged and has asserted control of their labor relations in general. It asserts, and rightfully so, under our decision in the *Packard* case, *supra*, its power to decide whether these foremen may constitute themselves a bargaining unit. We do not believe this leaves room for the operation of the state authority asserted." (Ibid pp. 775-776).

The rule of the *Bethlehem Steel Co.* case is clear. The National Labor Relations Board had exclusive jurisdiction under the Wagner Act over all questions of representation affecting commerce. The State Boards did not have concurrent jurisdiction over such questions. We do not discuss the effect under the Wagner Act of an agreement by the National Board to cede jurisdiction to a State Board in a case of representation affecting commerce, or of a declination of jurisdiction by the National Board for budgetary or other reasons. These points were not raised by the facts in the *Bethlehem Steel Co.* case nor are they raised by the facts in the instant case.

The Congress has given recent evidence in the Labor Management Relations Act of 1947 * of what it considers a reasonable solution to the problem of adjusting State and Federal authority in the labor relations field. In appraising the Congressional intent expressed in the Wagner Act, this evidence may be considered to have a value equal to inference of intent which is drawn not so much from the language of the statute but from the assumption that Congress intended a reasonable answer to the Federal-State problem in labor relations administration. The Congress, when legislating specifically on the subject, has not vested a general concurrent jurisdiction in the States; nor has it provided that the administrative agency which is first on the scene shall have jurisdiction of the case. On

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* Act of June 23, 1947, Public Law 101, 80th Congress, 1st Session (29 U.S.C., Supp. 151 et seq.).

the contrary, it has recognized the exclusive jurisdiction of the National Board and has provided that such jurisdiction of the board can be *ceded* but only in certain types of cases and if there is followed the procedure of *agreement* between the State and National administrative agencies. It should be presumed, in our view, that the Congress was aware, both when it adopted the Wagner Act and when it adopted the Labor-Management Relations Act of 1947 of the tendency of dual administrative agencies to engage in competition and the duplication of functions as well as the tendency of private parties to "shop around" for the most advantageous forum.

Section 10(a) of the new Act provides that "the Board is empowered by agreement with any agency of any State or Territory to cede to such agency jurisdiction over any cases in any industry (other than mining, manufacturing, communications, and transportation except where predominantly local in character) even though such cases may involve labor disputes affecting commerce, unless the provision of the State or Territorial statute applicable to the determination of such cases by such agency is inconsistent with the corresponding provision of this Act or has received a construction inconsistent therewith."

The explanation of this provision in the Conference Report on the bill is as follows:

> "The Senate amendment, contained a proviso at the end of section 10(a) authorizing the Board to cede jurisdiction over any cases in any industry to State and Territorial agencies, subject to two conditions: (a) That it can cede jurisdiction in cases arising in mining, manufacturing, communications and transportation only when the employer's operations are predominantly local in character, and (b) that it may cede jurisdiction only if the applicable provisions of the State or Territorial statute and the rules of decision thereunder are consistent with the corresponding provisions of the National Act,

as interpreted and applied by the Board and by the courts. The House bill contained no provision corresponding with the proviso of section 10(a) of the Senate amendment. The conference agreement adopts this proviso." *Legislative History of the Labor Management Relations Act of* 1947, (published by the National Labor Relations Board) p. 536.

The House Report stated that:

"As under the present Act, the power of the Board under the amended act in the matter of unfair labor practices is exclusive.[4] This rule has necessitated a special provision (sec. 13, hereafter discussed) to give to the States a concurrent jurisdiction in respect to closed shop and other union security arrangements. The rule of exclusive jurisdiction was developed many years ago by the Supreme Court in order to provide for uniformity in matters of national policy under the commerce clause." (Ibid p. 331)

The procedure for ceding jurisdiction of the National Labor Relations Board which is established by section 10(a) has not been generally utilized because the States have not, as yet, enacted statutes paralleling the Labor-Management Relations Act of 1947. See *Report of the Joint Committee on Labor Management Relations Pursuant to Section 401 of the Labor-Management Relations Act*, Report No. 986, 80th Congress, 2nd Session, pp. 30-31. As a result of negotiations between the National Board and representatives of the State of Wisconsin an agreement has been reached, effective August 27, 1948, which is limited solely to the administration of the union security provisions of the State and National Acts. (22 L.R.R.M.

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[4] If literal effect is given to this sentence and the placing of the jurisdiction clause in section 10, the procedure for ceding jurisdiction to the States would appear limited to unfair labor practice cases. The legislative history of the Act, as a whole, does not bear out this interpretation and the procedure would appear available in representation cases.

268). There has not been, nor is there now, an agreement between the National Board and the State Board of Wisconsin allocating or ceding jurisdiction in representation proceedings.

There are a number of recent cases in the lower courts decided since *Bethlehem Steel Co.* which have discussed the matter of federal state relationships in the field of certification of bargaining representatives. All the courts, with the exception of the Wisconsin Supreme Court, have ruled that the federal power is exclusive in this field and that the state administrative agencies may not act in cases affecting commerce until the federal power is actually exercised in the particular case.

In *Pittsburgh Rys. Co. Substation Operators and Maintenance Employees* case, 357 Pa. 379, 54 A. (2d) 891, the Pennsylvania Labor Relations Board issued a certification of a bargaining representative, prior to enactment of the Labor-Management Relations Act of 1947, for a unit of employees of a company engaged in operations affecting commerce and in *Food, Tobacco Union* v. *Smiley*, 164 F. (2d) 891, (C.A.A. 3) this Board sought to institute certification proceedings in a similar situation. On the basis of the rule in *Bethlehem Steel Co.* the Pennsylvania Court and the U. S. Circuit Court of Appeals for the Third Circuit [5] held the National Board had exclusive jurisdiction over the subject matter and the State Board was, therefore, barred from asserting concurrent jurisdiction.

Certification proceedings instituted before State Boards by labor organizations which have not complied with sections 9(f), (g) and (h) of the Labor-Management Relations Act of 1947 have been restrained by Federal District Courts at the instance of a private party (*Linde Air Products Co.* v. *Johnson*, 77 F. Supp. 656) and of the

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[5] The Circuit Court in *Food, Tobacco Union* v. *Smiley* considered binding the definition of the authority of the State Board by the highest appellate court in Pennsylvania. *Erie Railroad Co.* v. *Tompkins* 304 U.S. 64.

National Board (*N.L.R.B.* v. *Industrial Commission of Utah*, 15 Labor Cases, Par. 64, 626).[6]

III. THE QUESTION OF REPRESENTATION OVER WHICH THE STATE BOARD IN THIS PROCEEDING SOUGHT TO ASSERT JURISDICTION AFFECTS COMMERCE AND IS, THEREFORE, WITHIN THE EXCLUSIVE JURISDICTION OF THE NATIONAL BOARD.

A. THE LA CROSSE TELEPHONE CORPORATION IS AN INSTRUMENTALITY OF INTERSTATE COMMERCE.

The status under the National Act of the telephone industry in general, and the La Crosse Telephone Corporation in particular, is determined not only by what the National Board has done but also by what it is permitted or required to do under law. The National Board is not an agency of self creating or self abnegating powers. It is a government bureau authorized or directed to carry out the expressed will of the Congress.

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[6] Faced with the identical problem, the Wisconsin Employment Relations Board first adopted the rule that "Once the National Board has assumed jurisdiction and declined to act, not because of its lack of jurisdiction, but because one of the parties before it is barred by the provisions of the statute, the power of the state to act has been superseded by the exercise of the conceded power of the Federal Government." (*Eau Claire Press Co.* Case II No. 1797 E-659, Decision No. 1456, November 3, 1947, 21 Labor Relations Reporter Manual 1085). Subsequently, the Wisconsin Board ruled that the fact that the particular case had not been presented to the National Board did not affect the conclusion that the State Board lacked jurisdiction. "Where the evidence is clear that the employer's labor relations fall within the jurisdiction of the national act, any action by the state in conflict with the policy of the national act is prevented under the rules laid down in the Bethlehem case. It is our conclusion that when Congress prevented, by legislation, the National Board from entertaining any proceedings instituted by non-complying unions it has determined the policy to be followed. The adoption by Congress of this policy, followed by the National Board, is an exercise of its jurisdiction in accordance with the mandate of Congress and effectively prevents the state from acting in a contrary manner." (*Crown Can Co.* Decision of Wisconsin Employment Relations Board Case I, No. 2195 E-769, Decision No. 1738-A, August 21, 1948; 22 Labor Relations Reporter Manual 1369, 1370).

The jurisdiction of the Board over representation cases is fixed by the phrase "question affecting commerce" (sec. 9(c)). "Affecting commerce" is defined by the Act as meaning "in commerce, or burdening or obstructing commerce or the free flow of commerce, or having led or tending to lead to a labor dispute burdening or obstructing commerce or the free flow of commerce" (Sec. 2(7)). The term "commerce" is defined by the Act to include "communication among the several states (Sec. 2(6))."

No labored exposition is required to show that a company such as the La Crosse Telephone Corporation operating in a city of more than 40,000, located on the river separating the States of Wisconsin and Minnesota and serving 15,000 subscribers in a county adjacent to the State line (*supra*, pp. 2-3) is engaged in interstate communication and is, therefore, an instrumentality of commerce. The Circuit Court of La Crosse County found, moreover, that "it is admitted that the La Crosse Telephone Corporation is so engaged in interstate commerce" (R. 1). This finding was not disturbed by the Supreme Court of Wisconsin which indeed recognized the paramount character of the National Board's power over the determination of the appropriate bargaining representative or unit of representation in the case involved in these appeals (R. 55).[7] The Supreme Court of Wisconsin specifically described the status of the La Crosse Telephone Corporation as follows: "The Employer is a Wisconsin Corporation and all its employees are employed in La Crosse County in this state in its operation of a local telephone service within the La Crosse area, and rendering in connection therewith such intrastate and interstate long distance service as is incidental thereto" (R. 49).

In the similar case of *National Labor Relations Board* v. *Central Missouri Telephone Company* 115 F.(2d) 563 (C.C.A. 8) the National Board asserted jurisdiction over a telephone company whose lines were wholly within the

[7] See *Hill* v. *Florida*, 323 U.S. 538, 543-544, Fn. 2.

State of Missouri. This company made wire connections for incoming and outgoing long distance calls with an interstate carrier (the Bell System) which handled such calls after the connections were made. The court upheld the assertion of jurisdiction on the ground that the telephone company was an instrumentality of commerce and thus engaged in interstate commerce within the meaning of the Act, regardless of the fact that the long distance calls constituted only a small percentage of the total messages handled.

The Corcoran Telephone Exchange of Corcoran, California, (population 2,092)[8] has been held an instrumentality of commerce although its lines were limited to the city of Corcoran *N.L.R.B.* v. *Boswell Co. and Corcoran Telephone Exchange,* 136 F. (2d) 585 (C.C.A. 9). Long Distance calls to or from points outside the city of Corcoran or California were effectuated through the facilities of the Exchange and the Pacific Telephone and Telegraph Company. During the year in question the Exchange handled over 35,000 toll calls through the facilities of the Pacific Telephone and Telegraph Company of which number there were 77 outgoing calls to points outside California and an undisclosed number of incoming calls from outside the State. The Court stated that "the facilities of the Exchange are an integral part of the vast network of telephone lines which cover the entire nation. While these lines are owned by a large number of small telephone companies, such as the Exchange, they are operated as a unified system by virtue of physical connection of the line and such operating agreements as are here involved. The Exchange's facilities and lines are admittedly available and used for the transmission of interstate messages, both those originating and terminating within the Exchange's system. The Exchange is thus an instrumentality of interstate commerce, and as such is clearly subject to Federal regulation, irrespective of any showing as to the amount of interstate traffic actually

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[8] *1940 Census.*

using its facilities. *Associated Press* v. *N.L.R.B.*, 301 U.S. 103, 128, *Pensacola Telegraph Co.* v. *Western Union Telegraph Co.* 96 U.S. 1."

The courts have frequently ruled that the coverage of the Act does not depend upon percentages. *Santa Cruz Fruit Packing Co.* v. *N.L.R.B.*, 303 U.S. 453, 467; *N.L.R.B.* v. *Fainblatt*, 306 U.S. 601; *Consolidated Edison Co.* v. *N.L.R.B.*, 305 U.S. 197; *J. L. Brandeis and Sons* v. *N.L.R.B.*, 142 F. (2d) 977 (C.C.A. 8), cert. den. 323 U.S. 751.

There are other cases showing that it has been the policy of the National Board to assume jurisdiction over the labor relations of telephone companies in the position of La Crosse Telephone Corporation.[9]

It is clear that labor strife affecting the continued operations of the La Crosse Telephone Corporation would substantially affect commerce. The Corporation and its labor relations are undoubtedly subject to the provisions of the National Labor Relations Act and the jurisdiction of the National Labor Relations Board.

B. THE JURISDICTION OF THE NATIONAL LABOR RELATIONS BOARD OVER QUESTIONS OF REPRESENTATION OF THE EMPLOYEES OF LA CROSSE TELEPHONE CORPORATION IS EXCLUSIVE.

Even if the policies of the Wisconsin and Federal labor relations acts were parallel on questions of representation the State Board would not thereby acquire concurrent jurisdiction. In the *Bethlehem Steel Co.* case, this Court clearly rejected the argument of the State of New York "for a rule that would enable it to act until the federal board had acted in the same case" (330 U.S. 767, 776). It is this very rule which was the basis of the decision of the Supreme Court

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[9] *The Elyria Telephone Company of Elyria, Ohio* 58 N.L.R.B. 402; *Newark Telephone Company of Newark, Ohio* 59 N.L.R.B. 1408; *Ohio Telephone Service Company* 72 N.L.R.B. 488.

of Wisconsin holding that the State Board had jurisdiction in the *La Crosse case*.[10]

The exercise of governmental power in the matter of selection of representatives for collective bargaining purposes does not constitute action merely in a ministerial capacity. This Court has recognized that the administrative authority in such cases has been delegated a wide discretion in applying the plan of regulation to specific instances. (*Bethelehem Steel Co., supra*, p. 775).

Indeed, this Court cited in support of its conclusion an illustration of conflicting determinations by the State and National Boards involved in the instant case. *Matter of Creamery Package Manufacturing Company* 34 N.L.R.B. 108; Wisconsin Employment Relations Board Decision Case No. 348 E 117.

The Wisconsin Board in the *Creamery Package Co.* case established a collective bargaining unit including confidential employees in its decision of June 23, 1941 and the National Board established a collective bargaining unit for employees of the same company excluding confidential employees in its decision of August 9, 1941.

Proof of the actuality of conflict between government agencies in the administrative application of parallel State and National policies in representation proceedings is not given for the purpose of conceding that such inquiry must be made by this Court. On the contrary, it is submitted that the Congress did not intend by enactment of the Wagner Act to leave concurrent jurisdiction in the State Boards, the constitutional status of which would depend in each case on a ruling by the United States Supreme Court as to whether the application of policy by the State Board to

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[10] "But, although the National Board's power over that subject is paramount it is not exclusive in such a case as we have here, until the federal power is exercised or jurisdiction thereto is taken as to particular employees." (*La Crosse Telephone Corporation* and *IBEW Local B-953* v. *Wisconsin Employment Relations Board et al.* (R. 55))

the facts of the individual case could be reconciled with the application of policy by the National Board to the facts in similar cases.

Nor can the answer to the question of whether Congress intended to leave concurrent jurisdiction in the States and their administrative agencies depend on the accident of whether the State Board gets the case first or whether the National Board has previously had the occasion to administer a representation proceeding for the employees of the particular company. The lack of reasonable basis for such a rule of jurisdiction is implicit in the accidental character of the test. The administrative agencies (New York and National Labor Relations Boards) having the widest measure of practical administrative experience with the problem of allocating jurisdiction agreed that jurisdiction must be allotted on the basis of the type of industry or business involved rather than on the basis of which Board a petition or charge is initially filed with. (*Supra*, p. 13).

Certainly, the Congress should not be assumed to have intended an unreasonable result unless this is expressly required by the specific language of the National Labor Relations Act. This, of course, is not the case, for that Act does not even provide for the yielding of jurisdiction to the States by agreement of the National Board.[11]

The question of whether the National Board could have yielded jurisdiction over the employees of the La Crosse Telephone Corporation is not presented by this case since the National and State Boards did not have an agreement nor is there evidence in the record even of informal clearance.

The present Act would require a formal agreement between the State and National Boards executed under section 10(a) as a condition precedent to the assumption of jurisdiction by the State Board. Such agreement could

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[11] See *Bethlehem Steel Co. supra*, Appendix to Separate Opinion, Fn. 1 at page 789.

not be made nor could the National Board yield or abdicate its power in a case where the facts raise a question of representation affecting commerce, unless the requirement of the proviso that the applicable state law be consistent with the corresponding provision of the National Act could be satisfied. In the case of Wisconsin and all the other states it has not been possible thus far for the National and State Boards to execute such an agreement covering representation proceedings because of the inconsistency of the provisions of State and Federal labor relations laws. (See 22 L.R.R.M. 268).[12]

The fact is, however, that the policies of the Wagner Act and the Wisconsin Employment Peace Act in representation cases were also inconsistent. Thus, in the instant case the petition for an election and the certification issued by the State Board excluded supervisory employees. The petition was drafted in accordance with section 111.02(3) of the Wisconsin Act which defined "employees" as including "any person, other than an independent contractor, working for another for hire in the State of Wisconsin in a non-executive or non-supervisory capacity." (Appendix to Brief p. 27). At this time, October 8, 1946 (R. 19) the National Labor Relations Act set forth a contrary

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[12] The lack of agreement ceding jurisdiction under section 10(a) of the Labor Management Relations Act of 1947 has not prevented the Wisconsin Employment Relations Board from assuming jurisdiction in representation proceedings involving employees of a boat manufacturing company admittedly engaged in interstate commerce. *Shell Lake Boat Co.* Decision of Wisconsin Employment Relations Board Case No. 1794 E-658 R-792, Decision No. 1437, September 29, 1947. This action was affirmed by decision of the Wisconsin Circuit Court for Washburn County relying upon the decision of the Supreme Court of Wisconsin in *La Crosse Telephone Corporation* and the practical effect of an adverse ruling on the State Boards. 22 Labor Relations Reporter Manual 2360, 2362-3. More recently the Wisconsin Board has announced the rule that it will refuse to direct elections in cases where the National Board has at some previous time assumed jurisdiction and determined the collective bargaining unit and certified a bargaining representative. *Kearney and Tucker Corp.* Case No. 1094 E-725, Decision No. 1636, May 21, 1948.

policy of authorizing representation proceedings for supervisory employees (*Packard Motor Car Co.* v. *N.L.R.B.* 330 U.S. 485) and it was the policy of the National Board to establish bargaining units for foremen (*Packard Motor Car Co. v. N.L.R.B.*, 61 N.L.R.B. 4, 1212 (1945); *Jones and Laughlin Steel Corp.*, 66 N.L.R.B. 386) and at no time did the National Board hold that supervisors were not employees, *Soss Manufacturing Co.*, 56 N.L.R.B. 348.

In this respect, therefore, the policies of the Acts and the Boards differed on exactly the same issue involved in the *Bethlehem Steel Co.* case.

Other differences in the provisions of the Acts relating to representation proceedings will be found in the authorization of the Wisconsin Act for the establishment of craft units by a majority vote of employees engaged in a single craft (Sec. 111.02(6) Appendix to Brief pp. 27-8) and the definition of strikers retaining the status of "employees" (Sec. 111.02(3) Appendix to Brief p. 27).

We are, therefore, of the view that even if the effort to limit the doctrine of the *Bethlehem Steel Co.* case were accepted, the National Board's jurisdiction in this case was exclusive of state power.

CONCLUSION

For the reasons set forth above, it is respectfully submitted that the judgment of the court below should be reversed.

Respectfully submitted.

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October, 1948.

APPENDIX A

The pertinent provisions of the Wisconsin Employment Peace Act (Wisconsin Laws of 1939, Chapter 57, as amended by Wisconsin Laws of 1943, Chapter 375, Wisconsin Laws of 1945, Chapter 424 and Wisconsin Laws of 1947, Chapter 2; Chapter 111, Sub Chapter I of the Wisconsin Statutes, Sections 111.01 to 111.09) are as follows:

Sec. 111.02(3). The term "employee" shall include any person, other than an independent contractor, working for another for hire in the State of Wisconsin in a non-executive or non-supervisory capacity, and shall not be limited to the employees of a particular employer unless the context clearly indicates otherwise; and shall include any individual whose work has ceased solely as a consequence of or in connection with any current labor dispute or because of any unfair labor practice on the part of an employer and (a) who has not refused or failed to return to work upon the final disposition of a labor dispute or a charge of an unfair labor practice by a tribunal having competent jurisdiction of the same or whose jurisdiction was accepted by the employee or his representative, (b) who has not been found to have committed or to have been a party to any unfair labor practice hereunder, (c) who has not obtained regular and substantially equivalent employment elsewhere, or (d) who has not been absent from his employment for a substantial period of time during which reasonable expectancy of settlement has ceased (except by an employer's unlawful refusal to bargain) and whose place has been filled by another engaged in the regular manner for an indefinite or protracted period and not merely for the duration of strike or lockout; but shall not include any individual employed in the domestic service of a family or person at his home or any individual employed by his parent or spouse or any employee who is subject to the federal railway labor act,

Sec. 111.02(6). The term "collective bargaining unit" shall mean all of the employees of one employer (employed within the state), except that where a majority of such em-

ployees engaged in a single craft, division, department or plant shall have voted by secret ballot as provided in Section 111.05 (2) to constitute such group a separate bargaining unit they shall be so considered, provided, that in appropriate cases, and to aid in the more efficient administration of the employment peace act, the Board may find where agreeable to all parties affected in any way thereby an industry, trade or business comprising more than one employer in an association in any geographical area to be a "collective bargaining unit". A collective bargaining unit thus established by the Board shall be subject to all rights by termination or modification given by this Chapter 111 in reference to collective bargaining units otherwise established under said chapter. Two or more collective bargaining units may bargain collectively through the same representative where a majority of the employees in each separate unit shall have voted by secret ballot as provided in Section 111.05 (2) so to do.

Sec. 111.05 Representatives and Elections.—(1) Representatives chosen for the purposes of collective bargaining by a majority of the employees voting in a collective bargaining unit shall be the exclusive representatives of all of the employees in such unit for the purpose of collective bargaining, provided that any individual employee or any minority group of employees in any collective bargaining unit shall have the right at any time to present grievances to their employer in person or through representatives of their own choosing, and the employer shall confer with them in relation thereto.

(2) Whenever a question arises concerning the determination of a collective bargaining unit as defined in Section 111.02(6), it shall be determined by secret ballot, and the Board, upon request, shall cause the ballot to be taken in such manner as to show separately the wishes of the employees in any craft, division, department or plant as to the determination of the collective bargaining unit.

(3) Whenever a question arises concerning the representation of employees in a collective bargaining unit the

Board shall determine the representatives thereof by taking a secret ballot of employees and certifying in writing the results thereof to the interested parties and to their employer or employers. There shall be included on any ballot for the election of representatives the names of all persons submitted by an employee or group of employees participating in the election, except that the Board may, in its discretion, exclude from the ballot one who, at the time of the election stands deprived of his rights under this chapter by reason of a prior adjudication of his having engaged in an unfair labor practice. The ballot shall be so prepared as to permit of a vote against representation by anyone named on the ballot. The Board's certification of the results of any election shall be conclusive as to the findings included therein unless reviewed in the same manner as provided by subsection (8) of Section 111.07 for review of orders of the Board.

(3m) Whenever an election has been conducted pursuant to subsection (3) in which the name of more than one proposed representative appears on the ballot and results in no conclusion, the Board may, in its discretion, if requested by any party to the proceeding within 30 days from the date of the certification of the results of such election, conduct a run-off election. In such run-off election, the Board may drop from the ballot the name of the representative that received the least number of votes at the original election, or the privilege of voting against any representative when the least number of votes cast at the first election was against representation by any named representative.

(4) Questions concerning the determination of collective bargaining units or representation of employees may be raised by petition of any employee or his employer (or the representative of either of them). Where it appears by the petition that any emergency exists requiring prompt action, the Board shall act upon said petition forthwith and hold the election requested within such time as will meet the requirements of the emergency presented. The fact that one election has been held shall not prevent the holding of

another election among the same group of employees, provided that it appears to the Board that sufficient reason therefor exists.

Sec. 111.07(8). The order of the Board shall also be subject to review in the manner provided in Chapter 227, except that the place of review shall be the circuit court of the county in which the appellant or any party resides or transacts business.

(10) Commencement of proceedings under subsection (7) shall, unless otherwise specifically ordered by the court, operate as a stay of the Board's order.

(11) Petitions filed under this section shall have preference over any civil cause of a different nature pending in the circuit court, shall be heard expeditiously, and the circuit courts shall always be deemed open for the trial thereof.

APPENDIX B

The pertinent provisions of the National Labor Relations Act (Act of July 5, 1935, 49 Stat. 449, 29 U.S.C. 151 et seq.) and of the Labor Management Relations Act, 1947 (Act of June 23, 1947, Public Law 101, 80th Congress, 1st Session, 29 U.S.C., Supp., 151 et seq.) are as follows:

(1) The pertinent provisions of the National Labor Relations Act includes Secs. 2(3), 2(6), 2(7), 4(a), 9, and 10(a). These sections are set forth below:

Sec. 2. When used in this Act—

* * * * *

"(3) The term 'employee' shall include any employee, and shall not be limited to the employees of a particular employer, unless the Act explicitly states otherwise, and shall include any individual whose work has ceased as a consequence of, or in connection with, any current labor dispute or because of any unfair labor practice, and who has not obtained any other regular and substantially equivalent employment, but shall not include any individual employed as an agricultural laborer, or in the domestic service of any family or person at his home, or any individual employed by his parent or spouse.

"(6) The term 'commerce' means trade, traffic, commerce, transportation, or communication among the several States, or between the District of Columbia or any Territory of the United States and any State or other Territory, or between any foreign country and any State, Territory, or the District of Columbia, or within the District of Columbia or any Territory, or between points in the same State but through any other State or any Territory or the District of Columbia or any foreign country.

"(7) The term 'affecting commerce' means in commerce, or burdening or obstructing commerce or the free flow of commerce, or having led or tending to lead to a labor dispute burdening or obstructing commerce or the free flow of commerce."

"Sec. 4(a). Each member of the Board shall receive a salary of $10,000 a year, shall be eligible for reappointment, and shall not engage in any other business, vocation, or employment. The Board shall appoint, without regard for the provisions of the civil-service laws but subject to the Classification Act of 1923, as amended, an executive secretary, and such attorneys, examiners, and regional directors, and shall appoint such other employees with regard to existing laws applicable to the employment and compensation of officers and employees of the United States, as it may from time to time find necessary for the proper performance of its duties and as may be from time to time appropriated for by Congress. The Board may establish or utilize such regional, local, or other agencies, and utilize such voluntary and uncompensated services, as may from time to time be needed. Attorneys appointed under this section may, at the direction of the Board, appear for and represent the Board in any case in court. Nothing in this Act shall be construed to authorize the Board to appoint individuals for the purpose of conciliation or mediation (or for statistical work), where such service may be obtained from the Department of Labor.

"9(a) Representatives designated or selected for the purposes of collective bargaining by the majority of the employees in a unit appropriate for such purposes, shall be the exclusive representatives of all the employees in such unit for the purposes of collective bargaining in respect to rates of pay, wages, hours of employment, or other conditions of employment: *Provided*, That any individual employee or a group of employees shall have the right at any time to present grievances to their employer.

"(b) The Board shall decide in each case whether, in order to insure to employees the full benefit of their right to self-organization and to collective bar-

gaining, and otherwise to effectuate the policies of Sections 151-166 of this title, the unit appropriate for the purposes of collective bargaining shall be the employer unit, craft unit, plant unit, or subdivision thereof.

"(c) Whenever a question affecting commerce arises concerning the representation of employees, the Board may investigate such controversy and certify to the parties, in writing, the name or names of the representatives that have been designated or selected. In any such investigation, the Board shall provide for an appropriate hearing upon due notice, either in conjunction with a proceeding under section 160 of this title or otherwise, and may take a secret ballot of employees, or utilize any other suitable method to ascertain such representatives.

"(d) Whenever an order of the Board made pursuant to section 160 (c) of this title is based in whole or in part upon facts certified following an investigation pursuant to subsection (c) of this section, and there is a petition for the enforcement or review of such order, such certification and the record of such investigation shall be included in the transcript of the entire record required to be filed under subsections 160(e) or 160(f) of this title, and thereupon the decree of the court enforcing, modifying, or setting aside in whole or in part the order of the Board shall be made and entered upon the pleadings, testimony, and proceedings set forth in such transcript.

"Sec. 10(a) The Board is empowered, as hereinafter provided, to prevent any person from engaging in any unfair labor practice (listed in section 8) affecting commerce. This power shall be exclusive, and shall not be affected by any other means of adjustment or prevention that has been or may be established by agreement, code, law, or otherwise.

(2) The pertinent provisions of the Labor Management Relations Act, 1947 include Secs. 2(3), 2(6), 2(7), 4(a), 9, and 10(a).

"Sec. 2(3). The term 'employee' shall include any employee, and shall not be limited to the employees of a particular employer, unless the Act explicitly states otherwise, and shall include any individual whose work has ceased as a consequence of, or in connection with, any current labor dispute or because of any unfair labor practice, and who has not obtained any other regular and substantially equivalent employment, but shall not include any individual employed as an agricultural laborer, or in the domestic service of any family or person at his home or any individual employed by his parent or spouse, or any individual having the status of an independent contractor, or any individual employed as a supervisor, or any individual employed by an employer subject to the Railway Labor Act, as amended from time to time, or by any other person who is not an employer as herein defined.

"(6) The term 'commerce' means trade, traffic, commerce, transportation, or communication among the several States, or between the District of Columbia or any Territory of the United States and any State or other Territory, or between any foreign country and any State, Territory, or the District of Columbia, or within the District of Columbia or any Territory, or between points in the same State but through any other State or any Territory or the District of Columbia or any foreign country.

"(7) The term 'affecting commerce' means in commerce, or burdening or obstructing commerce or the free flow of commerce, or having led or tending to lead to a labor dispute burdening or obstructing commerce or the free flow of commerce.

"Sec. 4.(a) Each member of the Board and the General Counsel of the Board shall receive a salary of $12,000 a year, shall be eligible for reappointment, and shall not engage in any other business, vocation, or employment. The Board shall appoint an executive secretary, and such attorneys, examiners, and regional directors, and such other employees as it may from time to time find necessary for the proper performance of its duties. The Board may not

employ any attorneys for the purpose of reviewing transcripts of hearings or preparing drafts of opinions except that any attorney employed for assignment as a legal assistant to any Board member may for such Board member review such transcripts and prepare such drafts. No trial examiner's report shall be reviewed, either before or after its publication, by any person other than a member of the Board or his legal assistant, and no trial examiner shall advise or consult with the Board with respect to exceptions taken to his findings, rulings, or recommendations. The Board may establish or utilize such regional, local, or other agencies, and utilize such voluntary and uncompensated services, as may from time to time be needed. Attorneys appointed under this section may, at the direction of the Board, appear for and represent the Board in any case in court. Nothing in this Act shall be construed to authorize the Board to appoint individuals for the purpose of conciliation or mediation, or for economic analysis.

"SEC. 9.(a) Representatives designated or selected for the purposes of collective bargaining by the majority of the employees in a unit appropriate for such purposes, shall be the exclusive representatives of all the employees in such unit for the purposes of collective bargaining in respect to rates of pay, wages, hours of employment, or other conditions of employment: *Provided*, That any individual employee or a group of employees shall have the right at any time to present grievances to their employer and to have such grievances adjusted, without the intervention of the bargaining representative, as long as the adjustment is not inconsistent with the terms of a collective-bargaining contract or agreement then in effect: *Provided further*, That the bargaining representative has been given opportunity to be present at such adjustment.

"(b) The Board shall decide in each case whether, in order to assure to employees the fullest freedom in exercising the rights guaranteed by this Act, the unit appropriate

for the purposes of collective bargaining shall be the employer unit, craft unit, plant unit, or subdivision thereof: *Provided,* That the Board shall not (1) decide that any unit is appropriate for such purposes if such unit includes both professional employees and employees who are not professional employees unless a majority of such professional employees vote for inclusion in such unit; or (2) decide that any craft unit is inappropriate for such purposes on the ground that a different unit has been established by a prior Board determination, unless a majority of the employees in the proposed craft unit vote against separate representation or (3) decide that any unit is appropriate for such purposes if it includes, together with other employees, any individual employed as a guard to enforce against employees and other persons rules to protect property of the employer or to protect the safety of persons on the employer's premises; but no labor organization shall be certified as the representative of employees in a bargaining unit of guards if such organization admits to membership, or is affiliated directly or indirectly with an organization which admits to membership, employees other than guards.

"(c) (1) Whenever a petition shall have been filed, in accordance with such regulations as may be prescribed by the Board—

"(A) by an employee or group of employees or any individual or labor organization acting in their behalf alleging that a substantial number of employees (i) wish to be represented for collective bargaining and that their employer declines to recognize their representative as the representative defined in section 9(a), or (ii) assert that the individual or labor organization, which has been certified or is being currently recognized by their employer as the bargaining representative, is no longer a representative as defined in section 9(a); or

"(B) by an employer, alleging that one or more individuals or labor organizations have presented to

him a claim to be recognized as the representative defined in section 9(a);

the Board shall investigate such petition and if it has reasonable cause to believe that a question of representation affecting commerce exists shall provide for an appropriate hearing upon due notice. Such hearing may be conducted by an officer or employee of the regional office, who shall not make any recommendations with respect thereto. If the Board finds upon the record of such hearing that such a question of representation exists, it shall direct an election by secret ballot and shall certify the results thereof.

"(2) In determining whether or not a question of representation affecting commerce exists, the same regulations and rules of decision shall apply irrespective of the identity of the persons filing the petition or the kind of relief sought and in no case shall the Board deny a labor organization a place on the ballot by reason of an order with respect to such labor organization or its predecessor not issued in conformity with section 10(c).

"(3) No election shall be directed in any bargaining unit or any subdivision within which, in the preceding twelve-month period, a valid election shall have been held. Employees on strike who are not entitled to reinstatement shall not be eligible to vote. In any election where none of the choices on the ballot receives a majority, a run-off shall be conducted, the ballot providing for a selection between the two choices receiving the largest and second largest number of valid votes cast in the election.

"(4) Nothing in this section shall be construed to prohibit the waiving of hearings by stipulation for the purpose of a consent election in conformity with regulations and rules of decision of the Board.

"(5) In determining whether a unit is appropriate for the purposes specified in subsection (b) the extent to which the employees have organized shall not be controlling.

"(d) Whenever an order of the Board made pursuant to section 10(c) is based in whole or in part upon facts cer-

tified following an investigation pursuant to subsection (c) of this section and there is a petition for the enforcement or review of such order, such certification and the record of such investigation shall be included in the transcript of the entire record required to be filed under section 10(e) or 10(f), and thereupon the decree of the court enforcing, modifying, or setting aside in whole or in part the order of the Board shall be made and entered upon the pleadings, testimony, and proceedings set forth in such transcript.

"(e) (1) Upon the filing with the Board by a labor organization, which is the representative of employees as provided in section 9(a), of a petition alleging that 30 per centum or more of the employees within a unit claimed to be appropriate for such purposes desire to authorize such labor organization to make an agreement with the employer of such employees requiring membership in such labor organization as a condition of employment in such unit, upon an appropriate showing thereof the Board shall, if no question of representation exists, take a secret ballot of such employees, and shall certify the results thereof to such labor organization and to the employer.

"(2) Upon the filing with the Board, by 30 per centum or more of the employees in a bargaining unit covered by an agreement between their employer and a labor organization made pursuant to section 8 (a) (3) (ii), of a petition alleging they desire that such authority be rescinded, the Board shall take a secret ballot of the employees in such unit, and shall certify the results thereof to such labor organization and to the employer.

"(3) No election shall be conducted pursuant to this subsection in any bargaining unit or any subdivision within which, in the preceding twelve-month period, a valid election shall have been held.

"(f) No investigation shall be made by the Board of any question affecting commerce concerning the representation of employees, raised by a labor organization under subsection (c) of this section, no petition under section 9(e)

(1) shall be entertained, and no complaint shall be issued pursuant to a charge made by a labor organization under subsection (b) of section 10, unless such labor organization and any national or international labor organization of which such labor organization is an affiliate or constituent unit (A) shall have prior thereto filed with the Secretary of Labor copies of its constitution and bylaws and a report, in such form as the Secretary may prescribe, showing—

"(1) the name of such labor organization and the address of its principal place of business;

"(2) the names, titles, and compensation and allowances of its three principal officers and any of its other officers or agents whose aggregate compensation and allowances for the preceding year exceeded $5,000, and the amount of the compensation and allowances paid to each such officer or agent during such year;

"(3) the manner in which the officers and agents referred to in clause (2) were elected, appointed, or otherwise selected;

"(4) the initiation fee or fees which new members are required to pay on becoming members of such labor organization;

"(5) the regular dues or fees which members are required to pay in order to remain members in good standing of such labor organization;

"(6) a detailed statement of, or reference to provisions of its constitution and bylaws showing the procedure followed with respect to, (a) qualification for or restrictions on membership, (b) election of officers and stewards, (c) calling of regular and special meetings, (d) levying of assessments, (e) imposition of fines, (f) authorization for bargaining demands, (g) ratification of contract terms, (h) authorization for strikes, (i) authorization for disbursement of union funds, (j) audit of union financial transaction, (k) participation in insurance or other

benefit plans, and (l) expulsion of members and the grounds therefor;

and (B) can show that prior thereto it has—

"(1) filed with the Secretary of Labor, in such form as the Secretary may prescribe, a report showing all of (a) its receipts of any kind and the sources of such receipts, (b) its total assets and liabilities as of the end of its last fiscal year, (c) the disbursements made by it during such fiscal year, including the purposes for which made; and

"(2) furnished to all of the members of such labor organization copies of the financial report required by paragraph (1) hereof to be filed with the Secretary of Labor.

"(g) It shall be the obligation of all labor organizations to file annually with the Secretary of Labor, in such form as the Secretary of Labor may prescribe, reports bringing up to date the information required to be supplied in the initial filing by subsection (f) (A) of this section, and to file with the Secretary of Labor and furnish to its members annually financial reports in the form and manner prescribed in subsection (f) (B). No labor organization shall be eligible for certification under this section as the representative of any employees, no petition under section 9 (e) (1) shall be entertained, and no complaint shall issue under section 10 with respect to a charge filed by a labor organization unless it can show that it and any national or international labor organization of which it is an affiliate or constituent unit has complied with its obligation under this subsection.

"(h) No investigation shall be made by the Board of any question affecting commerce concerning the representation of employees, raised by a labor organization under subsection (c) of this section, no petition under section 9 (e) (1) shall be entertained, and no complaint shall be issued pursuant to a charge made by a labor organization under subsection (b) of section 10, unless there is on file with the

Board an affidavit executed contemporaneously or within the preceding twelve-month period by each officer of such labor organization and the officers of any national or international labor organization of which it is an affiliate or constituent unit that he is not a member of the Communist Party or affiliated with such party, and that he does not believe in, and is not a member of or supports any organization that believes in or teaches, the overthrow of the United States Government by force or by any illegal or unconstitutional methods. The provisions of section 35 A of the Criminal Code shall be applicable in respect to such affidavits.

"SEC. 10. (a) The Board is empowered, as hereinafter provided, to prevent any person from engaging in any unfair labor practice (listed in section 8) affecting commerce. This power shall not be affected by any other means of adjustment or prevention that has been or may be established by agreement, law, or otherwise: *Provided*, That the Board is empowered by agreement with any agency of any State or Territory to cede to such agency jurisdiction over any cases in any industry (other than mining, manufacturing, communications, and transportation except where predominantly local in character) even though such cases may involve labor disputes affecting commerce, unless the provision of the State or Territorial statute applicable to the determination of such cases by such agency is inconsistent with the corresponding provision of this Act or has received a construction inconsistent therewith.

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, ~~1947~~ 1948

No. ~~707~~ 38

LA CROSSE TELEPHONE CORPORATION,
Appellant,

vs.

WISCONSIN EMPLOYMENT RELATIONS BOARD, ET AL.

No. ~~707~~ 39

INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, LOCAL B-953, A. F. OF L.,
Appellant,

vs.

WISCONSIN EMPLOYMENT RELATIONS BOARD, ET AL.

APPEALS FROM THE SUPREME COURT OF THE STATE OF WISCONSIN

STATEMENT OPPOSING JURISDICTION

JOHN E. MARTIN,
Attorney General;
STEWART G. HONECK,
Deputy Attorney General;
BEATRICE LAMPERT,
Assistant Attorney General,
Counsel for Appellees.

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IN SUPREME COURT, STATE OF WISCONSIN

AUGUST TERM, 1947

Nos. 60 & 61

LA CROSSE TELEPHONE CORPORATION,

Petitioner and Respondent,

vs.

WISCONSIN EMPLOYMENT RELATIONS BOARD, L. E. GOODING, HENRY RULE, AND J. E. FITZGIBBON,

Defendants and Appellants

INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, LOCAL B-953, A. F. OF L.,

Petitioner and Respondent,

vs.

WISCONSIN EMPLOYMENT RELATIONS BOARD, L. E. GOODING, HENRY RULE, AND J. E. FITZGIBBON AS MEMBERS OF THE WISCONSIN EMPLOYMENT RELATIONS BOARD,

Defendants and Appellants

STATEMENT OF APPELLEE AGAINST JURISDICTION OF THE SUPREME COURT OF THE UNITED STATES.

Nature of Decision of Wisconsin Supreme Court

The appellants' statements as to jurisdiction have not fully and accurately described the nature of the ruling of

the Wisconsin Supreme Court from which appeal is taken, nor the nature of the contentions made by the appellee before the state court. The Wisconsin Supreme Court reversed a decision of a lower court, which was to the effect that the Wisconsin Employment Relations Board was precluded by the constitution from conducting an election to determine desires of employees of a local telephone corporation with respect to a collective bargaining representative even though the National Labor Relations Board had never taken any action involving the company or its employees, and even though the election did not contravene any substantive provision of the National Labor Relations Act nor any policy fixed by the National Labor Relations Board. In submitting to the state supreme court the issue of whether such ruling was correct, the appellee asked:

> "Does the National Labor Relations Act preclude the Wisconsin Employment Relations Board from conducting an election to determine the desires of employees of a local telephone corporation with respect to a collective bargaining representative, irrespective of whether the National Labor Relations Board has ever taken any action involving the company and its employees, and irrespective of whether the action of the state board contravenes any substantive provisions of the national act or any fixed policy of the national board?"

It was not contended by the appellee (because it was not necessary for purposes of his case), nor was it held by the state supreme court that the question could or should be answered with an unqualified negative. The supreme court decided, in accordance with the appellee's contentions, that the question could not be answered with an unqualified affirmative as the trial court had done. The gist of the Wisconsin Supreme Court's decision is that the state board is not precluded from conducting an election among em-

ployees of a local telephone company to determine their desires as to a bargaining agent when the National Labor Relations Board has never taken any jurisdiction whatever of the relations between the employer and its employees and when there is no showing of conflict with provisions or policies of the national act.

Facts*

As the Supreme Court of the United States pointed out in *Allen-Bradley Local 1111* v. *Wisconsin E. R. Board* (1942), 315 U. S. 740, 746-747, 62 S. Ct. 820, 86 L. Ed. 1154, it is not concerned with theoretical disputes or anticipated controversies, but with specific issues; and so it confines its consideration to the precise facts of the case before it rather than to attempt adjudication of the validity of other types of action which might arise in other cases. The court there said that it was "not under the necessity of treating the state Act as an inseparable whole"; but for purposes of a particular case must read the state act "as though it contained only those provisions which authorize the state Board" to take the particular type of action which it did take.

Under the foregoing rule, the facts which must be considered are:

The Telephone Guild of Wisconsin (hereinafter referred to as the Guild) petitioned the Wisconsin Employment Relations Board (hereinafter referred to as the State Board) to conduct an election to determine the desires of employees of the La Crosse Telephone Corporation (hereinafter referred to as the Company or the Employer) as to a bargaining representative. The State Board conducted an investigation, including a hearing, to determine whether the cir-

* Page references are to the record and appendix before the Wisconsin Supreme Court.

cumstances warranted invocation of its services, although such preliminary hearing and investigation are not expressly required by state statute.

The Company had been bargaining for a number of years previously with the International Brotherhood of Electrical Workers, Local B-953, A. F. of L. (hereinafter referred to as Local B-953) on behalf of employees in its plant and traffic departments.

After the hearing the State Board conducted an election among all the Company's employees, in which the plant and traffic department employees voted to bargain together as in the past, and voted overwhelmingly in favor of the Guild as a bargaining representative. (The vote in favor of the Guild was 91 against and only 14 for Local B-953) (R. 61, pp. 32-34; A-Ap. 121-124). The Board entered no order, but certified as a fact the results of this election.

The National Labor Relations Board has never at any time taken any jurisdiction with respect to either the Company or its employees. It has made no finding that any unfair practice or question of representation arising between such employer and its employees affects commerce.

There has been no conflict in the application of the Wisconsin law with either a substantive provision of an act of Congress or any policy formed by the National Labor Relations Board.

The State Board did not attempt to exercise any discretion respecting the bargaining unit, but merely conducted a vote to ascertain the wishes of the employees. The bargaining unit selected by the employees is entirely consistent with provisions of the national law and with policies followed by the National Board thereunder. (If there are any provisions of the Wisconsin statutes which might be applied, as to wholly intrastate enterprises, in

a manner different from that in which the National Act might be applied, the State Act makes provision under sec. 111.17 for severability so that provisions of the law which cannot be applied in a particular case do not prevent the application of other portions of the state law.)

The employer is a Wisconsin corporation, all of whose employees work within the boundaries of the state. Its primary function is to operate a local telephone service. There is nothing in the record made before the State Board to indicate that the Company engages in interstate service. Allegations to that effect were made in the petition for review, but allegations of fact in the petition for review are not part of the record which may be considered by state courts upon review. The only evidence relating to the source of the company's revenues which is properly in the record arose in the Supreme Court when the State Board called the attention of the Court (in accordance with the rules of judicial notice applicable in the state as illustrated in *Chicago & N. W. R. Co.* v. *Railroad Commission*, (1914) 156 Wis. 47, 145 N. W. 216, 974) to the last annual report filed by the employer with the State Public Service Commission, stating under oath that all of the employer's revenue was derived from intrastate service. The mere fact that the Company is subject to regulation by the State Public Service Commission demonstrates that it conducts an intrastate service of great importance to the people within the state.

We have no doubt that it also participates to some extent in interstate toll communication service although the extent of interstate commerce is to be proven rather than presumed, since its regulation lies in a delegated field. Whether the extent of interstate service of a primarily intrastate enterprise is sufficient to warrant the

finding necessary to assumption of jurisdiction by the National Board under the National Act is a question of fact which that Board must determine in each case. That is, where a question of representation does not actually arise *in* commerce, the National Board must determine as a fact whether it is of such moment that it threatens to obstruct commerce. As the Wisconsin Supreme Court has pointed out in its decision in the instant case, the National Board is not required to accept jurisdiction or exercise its powers on every petition or complaint filed with it because "Not every labor dispute arises to such dignity that it impedes and obstructs interstate commerce although the employer may be engaged in what has been defined as interstate commerce." That proposition is well illustrated in this case. The National Board did not take jurisdiction of the petition for election filed with it, and so it has never made the finding necessary to invoke application of the National Act.

As this Court pointed out in *Alabama State Federation of Labor* v. *McAdory,* (1945) 325 U.S. 450, 464, 65 S. Ct. 1384, 89 L. Ed. 1725:

> "• • • The National Labor Relations Act does not extend to all industries and all employees. It is only applicable to those employments in which strikes and labor disputes would affect interstate commerce *and are found to be such by the National Labor Relations Board.* • • •" (Emphasis supplied).

The fact in this case is that neither the National Labor Relations Act nor its successor has ever been applied to relations of the employer and employees here involved; and the National Board has never made any finding necessary to the application of those acts.

Argument

While it is the strong conviction of the appellee that the action here involved, even if it were legally enforcible, would not interfere with Congressional regulation of interstate commerce nor infringe upon any constitutional rights, we will not argue the merits of that position at this time. This argument will be restricted to jurisdictional points. Appeal will not lie in this case for two reasons: (1) The action appealed from is not a final judgment in the sense of making a final disposition of the rights of the parties. (2) The parties seeking appeal are not adversely affected by the action.

It requires no citation of authority to support the proposition that only final determinations are appealable to the United States Supreme Court. A merely practical order preparatory to a final hearing, by which the rights of the parties are not affected, is not a final order so as to be appealable. *Pulliam* v. *Christian*, (1848) 47 U.S. 209, 6 Howard 209, 12 L. Ed. 409. Where the decree involved is merely interlocutory in nature no appeal will lie to the United States Supreme Court even though state laws allow it to be appealed to the state appellate courts. *Reddall* v. *Bryan*, (1860) 65 U.S. 420, 24 Howard 420, 16 L. Ed. 740.

In support of the other jurisdictional proposition involved we cite *Alabama State Federation of Labor* v. *McAdory*, (1945) 325 U.S. 450, 463, 65 S. Ct. 1384, 89 L. Ed. 1725, in which the United States Supreme Court said:

> "* * * Only those to whom a statute applies *and who are adversely affected by it* can draw in question its constitutional validity in a declaratory judgment proceeding *as in any other.* * * *" (Emphasis supplied)

The court also said in *Voeller* v. *Neilston Warehouse Co.*, (1941) 311 U.S. 531, 537, 61 S. Ct. 376, 85 L. Ed. 322:

> "* * * Exercising the very delicate responsibility of passing upon the validity of state statutes, this Court has many times declared the rule that only those who have been injured as the result of the denial of constitutional rights can invoke our jurisdiction on constitutional questions. * * *"

Doubtless these rules arise from the fundamental proposition enunciated in *Faitoute Iron & Steel Co.* v. *Asbury Park*, (1942) 316 U.S. 502, 62 S. Ct. 1129, 86 L. Ed. 1629, that the constitution was "'intended to preserve practical and substantial rights, not to maintain theories.'"

In determining the nature of the action of which review is sought by the United States Supreme Court, we must look to the construction placed upon it by the supreme court of the state. As pointed out in *Hotel & R. E. I. Alliance* v. *Wis. E. R. Board*, (1942) 315 U.S. 437, 440, 62 S. Ct. 706, 86 L. Ed. 946, the question of the restraints, if any, imposed upon the parties "is for the Wisconsin Supreme Court to determine." The legal effect of the certification by the State Board of the results of an election conducted by it was termed by the State Court as "mere fact-finding procedure." No one can be aggrieved in the legal sense by a mere finding of fact which has no compulsory effect.

This viewpoint accords with the rulings of the Federal courts respecting certifications of the results of elections made by the National Board. Such certifications under the National Labor Relations Act were not even reviewable. *American Federation of Labor* v. *National L. R. Board* (1940), 308 U. S. 401, 60 S. Ct. 300, 305, 84 L. Ed. 347. While similar action of the State Board is made reviewable in

Wisconsin courts, that is the result of legislative policy rather than of constitutional necessity. As pointed out in *Reddall* v. *Byran* (1860), 65 U. S. 420, 24 Howard 420, 16 L. Ed. 740, a statute making action reviewable in state courts has no effect upon the jurisdiction of the Federal courts.

Federal courts have regularly held that elections and certification proceedings by the National Board are of a nonadversary, fact-finding character. See, for instance, the cases cited in *United R. & W. D. S. E. of A.* v. *Wisconsin E. R. Board* (1944), 245 Wis. 636, 641, 15 N. W. 2d 844:

> "* * * To the acts of the board in ordering and conducting and certifying the result of a referendum there is applicable, by analogy, the court's statement in *Southern S. S. Co. v. National Labor Relations Board* (3d Cir.), 120 Fed. (2d) 505, 506—
>
> "'A certification proceeding is of a nonadversary, fact-finding character in which the board plays the part of a disinterested investigator seeking merely to ascertain the desires of the employees as to their representation.'
>
> "See also *National Labor Relations Board* v. *Botany Worsted Mills* (3d Cir.), 133 Fed. (2d) 876, 882, in respect to an investigation preliminary to an election, to wit:
>
> "'The preliminary investigation and the hearing in the representation proceeding are not contentious litigation; not even litigation, but investigation.'"

The State Board's action was ministerial in character, somewhat similar to the action of general election officials who conduct elections and canvass their results. Such functions do not involve an exercise of discretion on the part of the officials. See, for instance:

Brockett v. *Maxwell* (1946), 38 S. E. 2d 176, 178, 73 Ga. App. 663;

Bourgeois v. *Fairchild* (1903), 33 So. 495, 496, 81 Miss. 708;

State ex inf. Anderson ex rel. Booth v. *Moss* (1915), 172 S.W. 1180, 1181, 187 Mo. App. 151;

State ex rel. Caldwell v. *McQueen* (1942), 159 S.W. 2d 436, 438, 178 Tenn. 478;

People ex rel. Griffith v. *Bundy* (1941), 109 P. 2d 261, 263, 264, 107 Colo. 102;

State ex rel. Donnell v. *Osburn* (1941), 147 S.W. 2d 1065, 1068, 1069, 347 Mo. 469, 136 A.L.R. 667.

The Wisconsin Supreme Court has pointed out that the State Board's action which is under consideration on these appeals does not involve the exercise of its discretion nor the formulation of any policy which does or could vary from those of the National Labor Relations Act:

> "The mere fact-finding procedure of the state board in the ascertainment of facts, and its thereupon ordering and conducting an election and certifying the result thereof constitutes an action in merely its ministerial capacity. * * *"

The appellants urge that the board's action was not ministerial because it made a determination of the status of a contract between the employer and Local B-953, during its investigation to determine whether an election should be held. It exercised no discretion in making such a determination, since it was obligated to apply the rules of law prevailing in this state. Such rules, according to *Ogden* v. *Saunders*, 25 U. S. 213, 12 Wheat. 213, 6 L. Ed. 606, necessarily govern the nature, requisites and validity of a contract made in this state. The board correctly applied such rules, as is demonstrated by the decision of the Wisconsin Supreme Court. It was pointed out in *Stevens* v. *Jones*

(1909), 123 N. W. 705, 708, 24 S. D. 97, that an action is no less ministerial because the person obligated to perform the act must first satisfy himself of the existence of the state of facts upon which the duty arises.

The certification of the results of an election conducted by the state board is merely the furnishing of information to parties who are presumably interested. The knowledge of such facts should assist them in their negotiations.

The certification is not made legally enforcible, perhaps for the reason that in at least nine cases out of ten no enforcement is needed. When parties know the facts, they can act accordingly. The certification serves only the purpose of acquainting them with the facts.

Before any legally enforcible action could be taken on the basis of a certification of the results of an election, additional proceedings would be necessary with the usual concomitants of notice, and hearing. The certification of the fact of the employee's wishes, therefore, is nothing more than an intermediate step without legal force.

The appellants have not shown, nor could they show, that they have been prejudiced or adversely affected by the certification. Although the certification was issued January 14, 1947, the appellants have ever since refused to recognize it without any adverse effect upon themselves. (No stay of execution was applied for or issued because no enforcement is possible.) Surely that fact in itself demonstrates that the appellants could not be prejudiced by a mere certification of the results of an election among the employees. If the knowledge of the desires of the employees has prejudiced the employer and the rejected organization, the prejudice is surely not to their constitutional rights. If anyone has been deprived of constitutional rights, or rights sought to be protected by Federal legisla-

tion, it has not been the appellants but the 91 employees whose choice of an agent has been frustrated by them.

Respectfully submitted,

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October Term, 1948

38

No. 38

LA CROSSE TELEPHONE CORPORATION,
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WISCONSIN EMPLOYMENT RELATIONS BOARD, ET AL.

39

No. 39

INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, LOCAL B-953, A. F. of L.,
Appellant,

v.

WISCONSIN EMPLOYMENT RELATIONS BOARD, ET AL.

Brief of Wisconsin Employment Relations Board

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TEXT

Restatement of the Law of Conflict and Laws,
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In the

Supreme Court of the United States

October Term, 1948

No. 38

LA CROSSE TELEPHONE CORPORATION,
Appellant,

v.

WISCONSIN EMPLOYMENT RELATIONS BOARD, ET AL.

No. 39

INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, LOCAL B-953, A. F. of L.,
Appellant,

v.

WISCONSIN EMPLOYMENT RELATIONS BOARD, ET AL.

Brief of Wisconsin Employment Relations Board

OPINIONS BELOW

The opinion of the Wisconsin Supreme Court from which appeal is taken is reported in 251 Wis. 583, 30 N. W. 241.

The Wisconsin Supreme Court reversed a judgment of the Circuit Court for La Crosse County which had set

aside and reversed a certification by the Wisconsin Employment Relations Board of an election conducted by it to ascertain the desires of certain employees with respect to a bargaining representative. The judgment of the Circuit Court, 12 C. H. H. Labor Cases par. 63,795, appears at pages 11 to 12 of the record.

The certification of the Wisconsin Employment Relations Board is unreported, but appears at pages 12 to 15 of the record.

The effect of the action of the Supreme Court of Wisconsin in reversing the judgment of the La Crosse County Circuit Court resulted in the entry of a judgment merely dismissing the petition for review of the state board's certification. It does not provide for the entry of any affirmative judgment which is enforcible by process of the court or otherwise.

STATEMENT RESPECTING GROUNDS ON WHICH JURISDICTION IS INVOKED

The appellants seek to invoke the jurisdiction of this court under sec. 237 (a) of the Judicial Code, 28 U. S. C. A. sec. 344.

The appellee has heretofore submitted a statement opposing jurisdiction, and on April 19, 1948 this court took the following action:

> "The statements of jurisdiction in these cases having been submitted and considered by the court, further consideration of the question of jurisdiction of this court is postponed to the hearing of the cases on the merits."

The jurisdictional question is accordingly included within the issues upon which argument is submitted in this brief.

QUESTIONS PRESENTED

1. Is a judgment of a state court, dismissing a petition for review of a certification of the results of an election conducted by a state agency to determine the wishes of employees of a local telephone company as to a bargaining representative, reviewable under section 237 (a) of the Judicial Code, when such certification imposes no enforcible obligation?

2. Did Congress, by the mere enactment of the National Labor Relations Act, preclude a state agency from conducting an election to ascertain the wishes of employees of a local telephone company with respect to a bargaining representative, when no enforcible order or judgment is entered on the basis of such election, and when the National Labor Relations Board has never taken jurisdiction of any phase of the labor relations between the employer and employees involved?[1]

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[1]The issue as stated on page 2 of the brief of the appellant, La Crosse Telephone Corporation merely repeats the question first posed to the Supreme Court of Wisconsin. The issue before this court is necessarily limited by the decision of the Wisconsin Court. The question was not answered by the Wisconsin court with an unqualified negative, but was based upon the circumstances that the National Labor Relations Board had never taken any jurisdiction whatever with respect to the company or its employees, and that the action of the state board did not contravene any policy of federal legislation.

STATEMENT OF THE CASE

We believe there can be no dispute as to the facts recited by the Wisconsin Supreme Court, at 251 Wis. 586-589, 30 N. W. 2d 242-3. Some of the facts recited by the state supreme court are not necessary to a disposition of the narrower issues raised by this appeal, and so we will cull from the state court's decision only those facts which are pertinent here.

On October 8, 1946 the Telephone Guild of Wisconsin (hereinafter referred to as the Guild) petitioned the Wisconsin Employment Relations Board (hereinafter referred to as the state board) to conduct an election to determine the desires of employees of the La Crosse Telephone Corporation (hereinafter referred to as the company or the employer) as to their collective bargaining representative. Although no hearing is required on such a petition by state statute (since the conduct of such election has been designated by state courts as "fact-finding procedure * * * in merely a ministerial capacity") the state board did conduct a hearing as a part of its investigation with respect to the petition before it.

The company had been bargaining with the International Brotherhood of Electrical Workers, Local B-953, A. F. of L. (hereinafter referred to as Local B-953) on behalf of employees in its plant and traffic departments (which included all excepting its office workers). The employer and Local B-953 had a contract expiring December 1, 1946 (R. 19-20, 23) with the provision that it should extend from year to year thereafter unless either party should give notice 90 days "prior to the annual expiration date requesting that the agreement be amended or cancelled"

(R. 36). Local B-953 had notified the employer on August 28, 1946 of a desire to amend the agreement under such provision (R. 22, 25).

Negotiations were undertaken between the company and employee committees for amendments, which resulted in acceptance of a modified proposal by the Local B-953 on the evening of September 25, 1946 (R. 27, 29-30). The employer was notified of such acceptance by letter dated September 27th (R. 22, 27, 30, 31).

In the meantime the Guild, which had received approximately 85 applications for membership among the company's employees (constituting substantially more than 50% of those eligible for membership) (R. 19) had petitioned the National Labor Relations Board (hereinafter referred to as the national board) for certification as bargaining representative of the employees represented previously by Local B-953. The employer was notified by letter dated September 24, 1946, from the national board's office in Minneapolis of the Guild's claim to represent the employees (R. 25).

On October 8, 1946 the Guild filed with the national board a request to withdraw the petition previously submitted (R. 18-19), and filed a petition for election with the Wisconsin board. As the Wisconsin Supreme Court stated:

> "There is nothing in the record * * * to indicate that the national board has ever in any manner exercised any of its powers or discretion or otherwise taken jurisdiction of any question or phase of the employers or its employees industrial relations" (R. 53).

The state board's only concern with the contract relation between the employer and Local B-953, was as it might affect the date when an election should be conducted. The board did not attempt to pass upon the rights and obligations of the parties under the contract, but considered the negotiations only as they might have a bearing upon whether the election should be postponed until a later date.

The state board then conducted an election on November 27, 1946, at which time the overwhelming majority of the employees in the unit previously represented by Local B-953 indicated a desire to have the Guild as their representative for future bargaining. There were 91 votes cast for the Guild, and 14 in favor of Local B-953 (R. 12-14).

The state board certified the results of the election on January 14, 1947, but issued no order. The employer and Local B-953 have continued to bargain in the same manner as they did prior to the election, disregarding the election and the expression of employees' wishes, and have together carried on litigation to contest the validity of the certification.

The Circuit Court for La Crosse County set aside the certification, but was reversed by the State Supreme Court. The judgment entered in the Circuit Court pursuant to the reversal merely dismissed the petitions for review of the board's certification.

No stay or supersedeas has been involved in the proceedings because there is nothing to stay. The certification contains no command and there is no penalty for disregarding it, as has been done in this case.

The nature of the company's operations is characterized by the Supreme Court of Wisconsin as follows:

"The Employer is a Wisconsin corporation and all its Employees are employed in La Crosse County in this state in its operation of a local telephone service within the La Crosse area, and rendering in connection therewith such intrastate and interstate long distance service as is incidental thereto."

The "incidental" long distance service above referred to entered the case solely by dint of judicial notice, because the record contained no evidence to that effect. The result seems entirely reasonable, however, and the respondent board is not disposed to quarrel with the decision of the State Supreme Court.

It has been urged in the brief of the appellant Local B-953 that the statement in the decision of the lower court whose judgment was reversed (to the effect that it is admitted that the La Crosse Telephone Corporation is "engaged in" interstate commerce) is controlling because it is a "finding." The only findings which are authorized to be made in these proceedings must be made by the board on the basis of evidence introduced before it. The courts sit in review only, and may neither hear nor consider evidence which was not before the board. Anything further which enters the courts' considerations beyond the board's findings would be on the basis of judicial notice.[2] The only agency authorized to make findings is the state board. It made no finding that the employer was "engaged in" interstate commerce; probably for the reason that there

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[2]Century Building Co. v. Wisconsin E. R. Board, (1940) 235 Wis. 376, 291 N. W. 305.
Wisconsin E. R. Board v. Allis-Chalmers W. Union, (1948) 252 Wis. 436, 31 N. W. 2d 772.
Wisconsin E. R. Board v. J. P. Cullen & Son, (1948) 253 Wis. 105, 33 N. W. 2d 182; 253 Wis. 109, 33 N. W. 2d 184.

was no evidence to that effect, since such issue was not raised in the hearing before the board.

The only evidence before the board which is urged as a basis for a finding with respect to interstate commerce is that the employer is a subsidiary of a corporation which has other subsidiaries, and that an Illinois company is operated from the "La Crosse Office." As to the first point, ownership of a company does not disclose the nature of its operations. As to the second, the operation of an Illinois company from a La Crosse office (presumably the office of the parent company) does not establish that operations of the La Crosse Telephone Company are other than local.

The evaluation of the record by the state Supreme Court supersedes that of the lower court. So far as the operations of the company are pertinent to the issues, therefore, the information in the records is summarized in the words of the state supreme court: That the employer is a Wisconsin corporation engaged in business wholly within the State of Wisconsin as a local public utility, with the usual long distance service incidental to a small local exchange.

SUMMARY OF ARGUMENT

I.

The action of the state board of which review is sought is not an order, but only the certification of the wishes of employees as expressed in an election conducted by the board. It is not enforcible and has no legal consequence unless further proceedings are instituted, hearing held, and order entered. In such case the further proceedings would not be enforcible until judicial review could be had.

The certification is not a final judgment within the meaning of sec. 237 (a) of the Judicial Code.

II.

Congress, by limiting the application of the representation and unfair practices sections of the federal law to questions and practices "affecting" commerce and by its definition of "affecting commerce," has left to states the power to regulate such matters not actually arising *in* commerce until the national board makes the factual findings necessary to invoke the application of the federal act in individual cases. Congress contemplated state regulation in such cases, as this court recognized in *Consolidated Edison Co. v. National Labor Relations Bd.*, (1938) 305 U. S. 197, 222-223, 83 L. ed. 126, 59 S. Ct. 206, where it was said that "in determining the factual question regard should be had to all existing circumstances including the bearing and effect of any protective action to the same end already taken under state authority."

The question of representation here involved did not arise *in* commerce. The National Labor Relations Board has never taken jurisdiction over any phase of the labor relations of the appellant employer or its employees.

There is not here involved any question of bargaining unit because that has been agreed upon by all parties, as federal legislation contemplates may be done.

The action of the state board involved the exercise of no discretion but merely made known a fact which would aid the process of collective bargaining. The action did not result in frustrating any policy of the federal law, but operated to aid in carrying out the objectives sought by federal legislation, by revealing that 91 out of 105 employees desired the Guild as their bargaining agent.

Wisconsin does not assert "joint" jurisdiction, but only subordinate jurisdiction to prevent disruptions inimical to internal welfare, until the federal agency is able to take over the situation. When that happens, the state courts recognize that the power of the federal agency is paramount.

The state law has been interpreted so that it may not be administered in a manner to frustrate objectives of applicable federal legislation, and is administered so as to avoid conflict. The state law as interpreted and administered seeks to accomplish the same objective of encouraging collective bargaining as is the purpose of the federal law.

Successful challenge of the state action would be to defeat the federal objective of assuring to employees the right to bargain through representatives of their own choosing.

III.

The re-enactment in the Labor-Management Relations Act, 1947, of the provisions of Title I which were the basis of the holding in the *Consolidated Edison Co. case* recognizing a field of state jurisdiction, operates as an approval of the plan of correlation of state and federal regulation there described.

The provisions of sec. 10 (a) providing for "ceding" jurisdiction entail a recognition that Congress did not intend to extinguish state power; else it could not constitutionally delegate to an administrative agency the power to recreate such power by administrative fiat.

The terminology used in sec. 10 (a) indicates that Congress recognized a field of state power in the absence of action by the National Labor Relations Board, and that cession was to be limited to cases in which the national board actually assumes jurisdiction so as to be able to "cede" it.

If sec. 10 (a) has any restrictive effect, it relates only to unfair practices, and not to questions of bargaining representatives.

IV.

The state board did not litigate any contract rights or obligations. In considering the date when an election could be most helpful, it correctly applied the state law so as to determine the date when a certain contract expired. Since the contract was made and to be performed in Wisconsin, the question had to be determined under state law.

The considerations with respect to the contract were only collateral issues and the certification by the state board did not purport to adjudicate upon the respective rights of the contracting parties.

ARGUMENT

I.

THE ACTION OF THE STATE BOARD AND THE STATE COURTS IS NOT REVIEWABLE UNDER SECTION 237 (a) OF THE JUDICIAL CODE

Sec. 237 (a) of the Judicial Code authorizes appeal only from a "final judgment."

The test of whether a judgment is final within the meaning of the federal statute is not affected by the fact that it may be designated final by state courts or state statutes.

> *Gospel Army v. City of Los Angeles,* (1947) 331 U. S. 543, 546, 548, 67 S. Ct. 1428, 91 L. ed. 1662;
>
> *Richfield Oil Corp. v. State Board of Equalization,* (1946) 329 U. S. 69, 67 S. Ct. 156, 91 L. ed. 80.

Neither is state action reviewable under the federal statute merely because it is made appealable by state law. *Reddall v. Bryan, et al.,* (1860) 65 U. S. 420, 24 How. 420, 16 L. ed. 740.

In the *Gospel Army case, supra,* this court said:

> "Under sec. 237 of the Judicial Code, 28 U. S. C., sec. 344, only 'final judgments' of state courts may be appealed to this Court. And it frequently has been said that for a judgment of an appellate court to be final and reviewable for this purpose it must end the litigation by fully determining the rights of the parties, so that nothing remains to be done by the trial court 'except the ministerial act of entering the judgment which the appellate court . . . directed.' *Department of Banking v. Pink,* 317 U. S. 264, 267. Thus, where the

effect of the state court's direction is to grant a new trial, the judgment will not be final."

Similarly, the opinion in *Richfield Oil Corp. case*, supra, stated:

"I. We are met at the outset with the question whether the judgment of the California Supreme Court is a 'final judgment' within the meaning of the Judicial Code sec. 237, 28 U. S. C. sec. 344 (a). * * *

"The designation given the judgment by state practice is not controlling. *Department of Banking v. Pink*, 317 U. S. 264, 268. The question is whether it can be said that 'there is nothing more to be decided' (*Clark v. Williard*, 292 U. S. 112, 118), that there has been 'an effective determination of the litigation.' *Market Street Ry. Co. v. Railroad Commission*, 324 U. S. 548, 551; see *Radio Station WOW v. Johnson*, 326 U. S. 120, 123-24. That question will be resolved not only by an examination of the entire record (*Clark v. Williard, supra*) but where necessary, by resort to the local law to determine what effect the judgment has under the state rules of practice. * * *"

It has been regularly held by this court that a mere finding of fact or report which may be used as a basis for state action but is not enforcible *per se* is not a final judgment within the meaning of the appeal statutes.

See *United States v. Atlanta, B. & C. R. Co.*, (1931) 282 U. S. 522, 527-528, 75 L. ed. 1244, 51 S. Ct. 237 in which it was held that a finding and conclusion of the Interstate Commerce Commission was not such final action as to be reviewable. The court said:

"* * * The action here complained of is not in form an order. It is a part of a report—an opinion as dis-

tinguished from a mandate. The distinction between a report and an order has been observed in the practice of the Commission ever since its organization—and for compelling reasons. Its functions are manifold in character. In some matters its duty is merely to investigate and to report facts. * * * No case has been found in which matter embodied in a report and not followed by a formal order has been held to be subject to jurisdictional review."

See, also, *Shannahan v. United States*, (1938) 303 U. S. 596, 599, 58 S. Ct. 732, 82 L. ed. 1039 where similar action was held not reviewable with the following comment:

"*First.* The function of the Commission is limited to the determination of a fact. Its decision is not even in form an order. It 'had no characteristic of an order, affirmative or negative.' * * * But even if this difficulty is overlooked, others are insuperable. The decision neither commands nor directs anything to be done. 'It was merely preparation for possible action in some proceeding which may be instituted in the future.' * * *"

To the same effect is *United States v. Los Angeles & S. L. R. Co.*, (1927) 273 U. S. 299, 47 S. Ct. 413, 71 L. ed. 651.

This court has also held that administrative action in the nature of a report or finding which may adversely affect the party on the contingency of some further action in the future is not reviewable until and unless such further action is taken. See *Rochester Telephone Corporation v. United States*, (1939) 307 U. S. 125, 129, 130, 83 L. ed. 1147, 59 S. Ct. 754 in which such type of action was discussed:

"(1) Where the action sought to be reviewed may have the effect of forbidding or compelling conduct

on the part of the person seeking to review it, but only if some further action is taken by the Commission. Such a situation is presented by an attempt to review a valuation made by the Interstate Commerce Commission which has no immediate legal effect although it may be the basis of a subsequent rate order.

"* * *

"In group (1) the order sought to be reviewed does not of itself adversely affect complainant but only affects his right adversely on the contingency of future administrative action. In view of traditional conceptions of federal judicial power, resort to the courts in these situations is either premature or wholly beyond their province. Thus, orders of the Interstate Commerce Commission setting a case for hearing despite a challenge to its jurisdiction, or rendering a tentative or final valuation under the Valuation Act, although claimed to be inaccurate, or holding that a carrier is within the Railway Labor Act and therefore amenable to the National Mediation Board, are not reviewable."

It has been said that a judgment is not final so as to be reviewable within sec. 237 (a) of the Judicial Code unless an affirmance would end the litigation between the parties, and the court below would have nothing to do but execute its judgment. *Georgia Ry. & Power Co. v. Town of Decatur,* (1923) 262 U. S. 432, 43 S. Ct. 613, 67 L. ed. 1065. See, also, *Market St. Ry. Co. v. Railroad Commission,* (1945) 324 U. S. 548, 89 L. ed. 1171, 65 S. Ct. 770, rehearing denied 324 U. S. 890, 89 L. ed. 1438, 65 S. Ct. 1020.

The tests of finality have been specifically applied to the identical type of action which is here sought to be reviewed, and this court has held it not reviewable. In *American Federation of Labor v. National L. R. Board,* (1939)

308 U. S. 401, 84 L. ed. 347, 60 S. Ct. 300 a certification of a bargaining representative by the National Labor Relations Board was held not to be reviewable. The same result was reached in *Switchmen's Union of North America v. National M. Board,* (1943) 320 U. S. 297, 88 L. ed. 61, 64 S. Ct. 95 with respect to a certification of a bargaining agent, which was given considerably more legal effect by force of statute than the certification under review because as the court commented, the statute contained a mandate to the employer to "treat with the representative certified." The court said, however:

> "* * * The Mediation Board makes no 'order.' And its only ultimate finding of fact is the certificate. *Virginian Ry. Co. v. System Federation, supra,* p. 562. The function of the Board under sec. 2, Ninth is more the function of a referee."

The action sought to be reviewed here is identical with that involved in the two foregoing cases. The state board issued no order. No judgment was entered in the state courts upon which execution could be issued. Nothing can be done by state courts or by any other state agency to enforce recognition or observance of the certification. It is nothing more than a report on the results of an investigation made known to the parties for such use as they desire to make of it.

The employer can not be required to bargain with the Guild, or with any other organization, until and unless an unfair practice charge is lodged against it and full hearing held upon due notice. Any order entered upon such hearing would be subject to judicial review, at which time any federal questions involved could be raised and litigated.

In that sense, it is analogous to the action involved in *Gospel Army v. City of Los Angeles, supra,* and the description in the first portion of the excerpt quoted from *Rochester Telephone Corporation v. United States, supra.*

An additional ground upon which review should be denied is the obvious fact that no one is aggrieved in a legal sense by a mere report of the results of an investigation. No one is subject to any jeopardy as the result of such a report. If being made aware of the true state of facts causes embarrassment to anyone, that surely has never been recognized as a legal grievance furnishing ground for judicial review. If anyone is the worse off for knowing the truth, it still would be inconsistent with precepts of freedom of speech to permit him to use the judicial process to suppress it. The courts will not strike down a state law on constitutional grounds at the behest of someone to whose injury it has not yet been applied.

As stated in *Alabama Federation of Labor v. McAdory,* (1945) 325 U. S. 450, 463, 65 S. Ct. 1384, 89 L. ed. 1725:

> "* * * Only those to whom a statute applies and who are adversely affected by it can draw in question its constitutional validity in a declaratory judgment proceeding as in any other. * * *"

Waters-Pierce Oil Co. v. Texas, (1909) 212 U. S. 86, 29 S. Ct. 220, 53 L. ed. 417;

Voeller v. Neilston Warehouse Co., (1941) 311 U. S. 531, 61 S. Ct. 376, 85 L. ed. 322.

The chief authority, cited by the appellants to support their position that the case now before the court is reviewable as a final judgment, is *Allegheny Ludlum Steel Corp. v. Kelley, et al.* (1947) 330 U. S. 767, 67 S. Ct. 1026, 91 L.

ed. 4234. The appellants' resume of that case shows that the procedure there involved was in no way comparable. The decree there was entered upon a prayer for declaratory judgment and injunction, and the appeal was by the petitioner to whom the judgment was adverse. The action of the New York board in that case was something more than a finding of fact; it was a discretionary determination. We assume that the legal effect to be given to the act of a state agency is fixed by the law of the state involved. Whether action of a New York agency has the legal effect of a final judgment depends upon the law of that state. Whether the action of a Wisconsin agency (and that is all that is here involved because the action of the reviewing court in declining to set aside gives it no further efficacy than it had in the first instance) has the legal effect of a final judgment is to be determined by the law of Wisconsin. Wisconsin's Supreme Court has said that the conduct of an election "is mere fact-finding procedure * * * in the ascertainment of facts" (R. 55), and that the result of the election has no further efficacy than to reveal "the desire of solely the employees themselves." *United R. & W. D. S. E. of A. v. Wisconsin E. R. Board,* (1944) 245 Wis. 636, 641, 15 N. W. 2d 844.

It has been suggested that the state board waive its objection to jurisdiction in order that a decision on the merits can be obtained, which of course would be satisfactory to the appellant. A far simpler course for the appellants, however, if they were sincere in their desire for an authoritative determination as to a bargaining representative and were convinced that it could only be obtained from the national board, would have been to have petitioned the national board for an election.

It is our understanding, in any event, that if jurisdiction be lacking, it cannot be conferred by consent or waiver of parties. *Mills v. Brown,* (1842) 41 U. S. 525, 10 L. ed. 1055; *People of State of New York v. Zimmerman,* (1928) 278 U. S. 63, 49 S. Ct. 61, 73 L. ed. 184.

II.

THE CERTIFICATION OF FACT MADE BY THE STATE BOARD DOES NOT CONFLICT WITH ANY POLICY OF FEDERAL LEGISLATION NOR INFRINGE UPON A DOMAIN PRE-EMPTED BY CONGRESS

The employer is a Wisconsin corporation. Its employees all work within the boundaries of this state. Its primary function is to operate an important local telephone service. As a public utility it is subject to state regulation of rates and service. An interruption in that service would involve serious effects upon the welfare of local residents.

The state supreme court judicially noticed that the company renders in connection with its local service such intrastate and interstate long distance service as is "*incidental* thereto." There is nothing to show that the incidence of interstate toll calls is subsantial; that a substantial number, or even *any*, of the employees in the bargaining unit involved is engaged primarily in interstate service; or that the question of a bargaining representative in the unit is likely to lead to a labor dispute which might have a substantial effect upon commerce. A strike of national proportions might readily interrupt local service along with interstate service; but whether a dispute in a single local

exchange would have a substantial effect on interstate service is quite another question.

We raise these points *not* for the purpose of urging that the National Labor Relations Board could not, if it made the proper factual finding with respect to the effect upon interstate commerce, take jurisdiction; nor for the purpose of urging that Congress could not, if it chose, legislate with respect to the company's labor relations so as to pre-empt the subject matter entirely and preclude the state from *any* regulation. The nature of the company's operations is stressed because we believe it has a bearing upon the extent to which Congress intended to leave the power to act in the state. We believe the federal statute manifests the intent to leave to states the right to exercise their traditional police power with respect to intrastate enterprises affecting the welfare of their people, when the National Labor Relations Board can not, or does not, take over the problem; and that the law exercises a different degree of pre-emption with respect to matters falling within its purview when they are in commerce than when they merely *affect* commerce.

There is nothing in the record to indicate that the question of representation here arose *in* commerce. The alternative finding to invoke jurisdiction under the National Act would be that it "affects" commerce, which is defined to mean that it is likely to lead to a labor dispute which would obstruct commerce. The record does not establish that a stoppage of work in the La Crosse Telephone Company would have any serious effect on interstate toll traffic. There is nothing to indicate that the amount of interstate communication is greater than could be handled by

an office worker in her spare time, should toll operators go on strike.

There is no question, however, that a stoppage would seriously affect the *internal* welfare of the state. Surely, in such cases Congress intended that states should be entitled to take protective action when the national agency is either unable or unwilling to act.

This congressional intent, we believe, is revealed in the definition of the term "affecting commerce" contained in both the National Labor Relations Act and in its successor, the Labor-Management Relations Act, 1947:

> "The term 'affecting commerce' means in commerce, *or* burdening or obstructing commerce or the free flow of commerce, or having led or tending to lead to a labor dispute burdening or obstructing commerce or the free flow of commerce." 29 U. S. C. A. Sec. 152 (7), 29 U. S. C. A. Supp. Sec. 152 (7).

The National Labor Relations Board is not given jurisdiction of *industries* as such, by the terms of the act, but only of questions of representation or unfair practices "affecting commerce." Under the foregoing definition, that means the questions or practices themselves must arise *in* commerce, or, if not, they must be shown as a fact to tend to obstruct commerce. This would seem to mean that, as to interstate commerce; Congress may have intended to assume plenary control which would automatically exclude states; but that as to matters arising in intrastate commerce it intended to assume control and thereby exclude states only in the specific cases where the necessary findings are made which are a necesary prerequisite to the application of federal law. Whether the effect of a particular contro-

versy is sufficient to warrant assumption of jurisdiction by the federal administrative board is left to be determined as a question of fact in each individual case when the business involved is essentially intrastate in character. Such a finding as related to the particular circumstances is a prerequisite to federal jurisdiction according to the rule of this court in *Consolidated Edison Co. v. National Labor Relations Bd.*, (1938) 305 U. S. 197, 222-223, 83 L. ed. 126, 59 S. Ct. 206 where the court said:

> "* * * And whether or not particular action is the conduct of intrastate enterprises does affect that commerce in such a close and intimate fashion as to be subject to federal control, is left to be determined as individual cases arise. *Id.*, see, also *Santa Cruz Packing Co. v. National Labor Relations Board*, 303 U. S. 453, 466, 467.
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> "* * *
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> "* * * But it is also true that where the employers are not themselves engaged in interstate or foreign commerce, and the authority of the National Labor Relations Board is invoked to protect that commerce from interference or injury arising from the employers' intrastate activities, the question whether the alleged unfair labor practices do actually threaten interstate or foreign commerce in a substantial manner is necessarily presented. And in determining that factual question regard should be had to all existing circumstances, including the bearing and effect of any protective action to the same end already taken under state authority. The justification for the exercise of federal power should clearly appear. * * *"

It has been urged by the appellant company that Congress must have approved the ruling of *Bethlehem Steel Co. v. New York State Labor Rel. Bd.*, (1947) 330 U. S. 767,

67 S. Ct. 1026, 91 L. ed. 1234, because no action was taken to the contrary. (With that contention we have no quarrel, since we are not under the necessity of urging that the decision should be overruled.) If that be true, it is surely likewise true that Congress is satisfied with the guides laid down in the *Consolidated Edison Case*, supra, because it has made no change in the provisions that the National Labor Relations Board is to take jurisdiction of only such questions of representation as affect commerce, of which the definition remains the same. That is, according to the foregoing case, if the question itself does not arise *in* commerce, the matter of its effect upon commerce is to be determined " as individual cases arise," and in such cases, the national board should have regard to "all existing circumstances, including the bearing and effect of any protective action to the same end already taken under state authority."

In neither the National Labor Relations Act nor in the Labor-Management Relations Act, 1947, did Congress make the applicability of the provisions relating to determinations of questions of representation dependent upon whether the *industry* affects commerce, but solely upon whether the particular *question* affects commerce. This distinction by Congress has been demonstrated to be intentional by the later enactment of the Labor-Management Relations Act, 1947. In the latter act, Congress made the applicability of some of the provisions dependent upon whether the *industry* affects commerce, as, for example, in Title III, Sections 301 and 302, 61 Stat. 156, 29 U. S. C. A. Supp. Sec. 185. It has, however, retained the same standards in Title I as were the basis for the discussion set out above from the *Consolidated Edison* case, that if the question itself does not arise *in* commerce, the board may take or re-

fuse jurisdiction in "individual cases" according to the circumstances "including the bearing and effect of any protective action to the same end already taken under state authority."

In other words, Congress has reenacted without change the very provisions which formed the basis of this court's recognition of a power left to states with respect to questions of representation not actually arising in commerce.

It is probably idle to contend in this era that there is any such thing as an industry which does not have some effect upon interstate commerce; and so if Congress should pass a law directly regulating labor relations in all *industries* affecting commerce there could be good ground for argument of preclusion of states from the field of labor relations altogether. With respect to enterprises essentially intrastate, however, Congress provided a standard by which the federal act should be applied only upon the basis of specific findings applicable to a single case.

Even though the circumstances are such as to furnish a basis for the proper jurisdictional findings by the national board, that still does not obligate it to take jurisdiction and to apply the act. As pointed out in *National L. R. Board v. Indiana & Michigan Elec. Co.*, (1943) 318 U. S. 9, 63 S. Ct. 394, 400, 87 L. ed. 579:

> "* * * It is not required by the statute to move on every charge; it is merely enabled to do so. * * *"

The discretion to decline to act is sometimes exercised on the basis that the extent of the effect of a particular dispute is not so great as to warrant the use of federal facilities. An illustration is the order issued by the National Board on July 30, 1948 in *Sta-Kleen Bak-*

ery, Inc., 78 N. L. R. B. 94, 22 L. R. R. M. 1257 in which the National Board expressly found that 70% of the employers' supplies came to it from another state but nevertheless declined to exercise its jurisdiction. The national board recognized that circumstances there existed which would have warranted its assumption of jurisdiction, but nevertheless declined to take it in the belief that the extent of the effect was not sufficient to warrant the use of federal facilities. Surely Congress did not intend in such a case that the company and its employees must remain permanently in a No-Man's Land without either federal or state regulation, simply because its operations affected commerce so that it would be subject to the federal law if the national board had chosen to accept jurisdiction.

The fact that some interstate commerce is involved or affected is not sufficient to warrant the assumption that the federal act will necessarily be applied to a specific dispute. Title II of the National Act cannot be applied except through the agency of the national board.

Local B-953 refers at pages 20 to 22 of its brief to several decisions of the National Labor Relations Board in which it took jurisdiction over unfair labor practices or representation controversies in telephone operating companies. Such decisions do not establish that telephone operating companies are necessarily interstate enterprises, since the ground upon which jurisdiction was assumed in those cases is the *effect* of the practice upon interstate commerce.

In the cases cited by Local B-953 the question before the courts was whether there was substantial evidence in the record to support the findings of the national board, in which case the board's findings are conclusive. The

courts held that there was evidence to support the board's findings that the practices affected commerce, but there was no indication that the courts would not also have upheld a contrary finding to the effect that the circumstances shown did not involve a sufficient burden upon interstate commerce to warrant assumption of the jurisdiction of the national board, *particularly if the circumstances had included "protective action to the same end" taken under state authority as in the instant case.*

The facts in the cases cited by Local B-953 are not the same as those in the one at bar. In the case of *National Labor Rel. Board v. Central Missouri Telephone Co.*, (1940, 8th C. C. A.) 115 F. 2d 563, for example, the employer owned and operated 27 local agencies all connected with each other, and had a very substantial interstate revenue. It was also shown that the employer purchased large quantities of material outside the state. No such factual showing is here involved.

Even if we assume that sufficient facts could be affirmatively shown in this case to warrant a finding by the National Labor Relations Board that the question of representation affects commerce to such an extent as to warrant assumption of federal jurisdiction, that admission is by no means equivalent to saying that the industry is *per se* removed from the field of state regulation.

In the case now before the court it cannot be disputed, as was pointed out by the state supreme court, that "there is nothing in the record of the proceedings before the state board or in the circuit court to indicate that the National Board has ever in any manner exercised any of its powers or discretion or otherwise taken jurisdiction of any ques-

tion or phase of the employers or its employees industrial relations" (R. 53).

That is one of the important distinctions between this case and the case of *Bethlehem Steel Co. v. New York State Labor Rel. Bd.*, (1947) 330 U. S. 767, 67 S. Ct. 1026, 91 L. ed. 1234. In the case now before the court, if federal power *has* been delegated, it lies "dormant and unexercised."

It has been urged that under the *dicta* of the *Bethlehem case* the "case-by-case test" of jurisdiction under the national and state labor relations acts has been abolished. The *dicta* does not so indicate. The supreme court there recognized that "the national board has exercised power to certify bargaining agents for units of employees other than foremen of both companies" (loc. cit. 330 U. S. 770-771) and that its failure to entertain foremen's petitions was such as to take on "the character of a ruling that no such regulation is appropriate or approved pursuant to the policy of the statute." (loc. cit. 330 U. S. 774.) The court said:

> "It [the National Board] made clear that its refusal to designate foremen's bargaining units was a determination and an exercise of its discretion to determine that such units were not appropriate for bargaining purposes. * * * *We cannot, therefore, deal with this as a case where federal power has been delegated but lies dormant and unexercised.*" (Emphasis supplied) (loc. cit. 330 U. S. 775).

On that premise the court said simply that it did not think that "a case-by-case test of federal supremacy is permissible *here*." (loc. cit. 330 U. S. 776) (Emphasis supplied). The court stated as a general proposition, however, that—

> "* * * when federal administrative regulation has been slight under a statute which potentially allows minute and multitudinous regulations of its subject * * * or even where extensive regulations have been made, if the measure in question relates to what may be considered a separable or distinct segment of the matter covered by the federal statute and the federal agency has not acted on that segment, the case will be treated in a manner similar to cases in which the effectiveness of federal supervision awaits federal administrative regulations." (loc. cit. 330 U. S. 774)

Certainly the above words recognize not only that a case-by-case test is *permissible*, but that it is *necessary* as to segments of the regulation upon which the national board either has not been authorized, or has not exercised its authority, to lay down broad policies. There is no other way of carrying out the rules laid down by this court in the case of *Consolidated Edison Co. v. National Labor Relations Bd.*, (1938) 305 U. S. 197, 83 L. ed. 126, 59 S. Ct. 206 in which it was held, as to intrastate enterprises, that determination as to whether jurisdiction over a particular representation question or a particular unfair practice was "left to be determined as individual cases arise."

A second point of distinction between the case now before the court and the *Bethlehem case, supra*, is that the action here sought to be reviewed is merely a ministerial finding of fact, or report, *not* involving the exercise of discretion of the state board. This court has followed the rule that in evaluating the meaning and legal effect of state action the interpretation given by the state court of last resort is authoritative.

With respect to the action taken by the state board in merely ascertaining a fact which was, or should have been,

useful to the parties in voluntary adjustment of their collective bargaining problems, the state supreme court said:

> "The state board's action, which is under consideration on these appeals, does not involve the exercise of its discretion nor the formulation of any policy which does or could vary from those of the National Labor Relations Act. The mere fact-finding procedure of the state board in the ascertainment of the facts, and its thereupon ordering and conducting the election and certifying the result thereof, constitutes action in merely its ministerial capacity * * * and does not deny to the National Board or interfere with its right to exercise its discretion and powers if it should ever conclude to exercise its jurisdiction and powers in that respect to determine the appropriate bargaining representative or unit of representation."

With respect to the same kind of action the Wisconsin Supreme Court said in *United R. & W. D. S. E. of A. v. Wisconsin E. R. Board*, (1944) 245 Wis. 636, 641, 15 N. W. 2d 844:

> "* * * The board's order for the conduct of a referendum election, as likewise its conduct thereof, is merely fact-finding procedure; and in the conduct thereof to determine the wishes of employees respecting an all-union agreement, the board acts in merely a ministerial capacity. The result of the referendum represents the desire of solely the employees themselves; and the board functions as but a disinterested investigator or supervisor to ascertain that desire. * * *"

In the *Bethlehem Steel case, supra*, on the other hand, the question decided by the state board was one upon which both the federal and state acts had delegated to the

administrative authority "a wide discretion in applying this plan of regulation." The national board had exercised its discretion not only by laying down a broad policy on appropriate bargaining units, but by actually fixing units for the particular companies and employees involved.[1] In the instant case the appropriateness of the bargaining unit is not in question because all parties are in agreement upon it. Where the appropriateness of a unit is not questioned it is not necessary for the national board to take any action before collective bargaining may be conducted. The federal law imposes the obligation to bargain irrespective of whether the national board has acted to fix an appropriate unit. If the appropriateness of the unit is not questioned by any party, discretionary power in that respect does not enter the picture. By far the greatest number of employers and employees who are engaged in collective bargaining throughout the country have never been engaged in a proceeding before the national board to fix an appropriate unit. Such a proceeding is not a prerequisite to bargaining or to the choice of a representative.

In this case, the bargaining unit was fixed by agreement of all parties, including the employees themselves, and so the certification of the state board represents nothing but the expression of the wishes of employees, in a unit admitted to be appropriate, as to their bargaining representative.

Both the federal and the Wisconsin statutes seek to guarantee the right of workers to free choice in the selection of a bargaining agent, and to insure the continuance

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[1] Matter of Allegheny Ludlum Steel Corporation, case No. III-R-111, N. L. R. B. June 29, 1942. Matter of Bethlehem Steel Corp. & C.I.O., 30 N.L.R.B. 1006, 32 N.L.R.B. 264, (1941).

of free choice by enabling them to change their selection at any time when they feel that the chosen agent does not represent their interests as well as could another. The obligation of an employer to deal with whatever bargaining agent the employees desire exists under both the national and state acts *independent* of any certification made by either board. It is the fact of the employees' choice that determines who shall be the agent, rather than any action by either board.

It has been suggested that certain provisions of the Wisconsin statutes as written *might* have conflicted with the discretion which the national board enjoyed under the National Labor Relations Act, before it was amended by the Labor-Management Relations Act, 1947. It is expressly provided in Wisconsin's law that any provision which can not be validly applied in any case shall be disregarded in such case, and the law has been so interpreted.

Wisconsin does not contend for "joint" jurisdiction as suggested in the brief of the appellant employer, but rather for a "subordinate" jurisdiction to act in intrastate enterprise where the national act has not been applied, in a manner not inconsistent with federal policy.

The state supreme court has made clear that in any case where the National Board enters a controversy, state action is superseded. As it said in *Allen-Bradley Local 1111 v. Wisconsin E. R. Board*, (1941) 237 Wis. 164, 179, 295 N. W. 791:

> "* * * To the extent that the orders of the National Labor Relations Board apply in a particular controversy, the jurisdiction of state authorities, both administrative and judicial, is ousted. When under the facts of a particular case interstate commerce is substan-

tially affected and the National Labor Relations Board takes jurisdiction, its determinations are final and conclusive, the determination of any state authority to the contrary notwithstanding."

We do not believe there is any irreconcilable difference in any of the provisions, but will not enlarge upon the point because, as this court pointed out in *Allen-Bradley Local 1111 v. Wisconsin E. R. Board*, (1942) 315 U. S. 740, 747-748, 62 S. Ct. 820, 86 L. ed. 1154:

"We are not under the necessity of treating the state Act as an inseparable whole. * * * Rather, we must read the state Act, for purposes of the present case, as though it contained only those provisions which authorize the state Board to enter orders of the specific type here involved. That Act contains a broad severability clause. The Wisconsin Supreme Court seems to have been liberal in interpreting such clauses so as to separate valid from void provisions of statutes. Aside from that, Wisconsin in this case has in fact applied only a few of the many provisions of its Act to appellants. And we have the word of the Wisconsin Supreme Court that 'the act affects the rights of parties to a controversy pending before the board only in the manner and to the extent prescribed by the order.' * * * That construction is conclusive here. * * * Hence we need not speculate as to whether the portions of the statute on which the order rests are so intertwined with the others that the various provisions of the state Act must be considered as inseparable. Since Wisconsin has enforced an order based only on one part of the Act, we must consider that portion exactly as Wisconsin has treated it -'complete in itself and capable of standing alone.' * * *"

The mere ascertainment of a fact by the state board certainly does not frustrate any policies of the National Act, cause any forfeiture of bargaining rights, nor handicap the National Board in exercising its discretion. On the contrary, clarification of facts might be of assistance to the National Board if it should ever assume jurisdiction.[1] The state action involved in the case of *Bethlehem Steel Co. v. New York State Labor Rel. Bd.*, (1947) 330 U. S. 767, 67 S. Ct. 1026, 91 L. ed. 1234, on the other hand, could have frustrated a policy within the discretion of the National Labor Relations Board.

The National Labor Relations Board, which is necessarily limited by appropriations, would find it impossible to conduct elections in every case in which the law intends that an employer should bargain with the employees' representatives. It would make almost impossible the carrying out of the purpose of the national act if it were necessary for the national board to conduct an election in every case before an employer is obligated to bargain with his employees' representatives.

Under the National Labor Relations Act an employer was required to bargain with "representatives designated or selected by the majority of the employes for purposes of collective bargaining." (29 U. S. C. A. 1945, §159) (This language remains the same in the Labor-Management Relations Act, 1947, P. L. 101—80th Cong., ch. 120—1st Session, 29 U. S. C. A. Supp. sec. 159). The obligation does not await action by the national board. The *fact* of the employees'

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[1] Sec. 4 (a) of Title I of the Labor Management Relations Act, 1947, 61 Stat. 139, 29 U. S. C. A. Supp. sec. 154 (a) provides that

"The Board may * * * utilize such regional, local, or other agencies, and * * * such voluntary and uncompensated services, as may from time to time be needed."

choice may be determined by agreement, by a card check of union membership, or by any other method satisfactory to the employees without action by the national board. Certainly, if the objectives of the national act can be carried out by mere agreement between private parties, there can hardly be any conflict with the purposes of that act when the state agencies act to relieve the national board of the burden of ascertaining the identical facts upon which both laws operate.

The case of *Bethlehem Steel Co. v. New York State Labor Rel. Bd.*, (1947) 330 U. S. 767, 67 S. Ct. 1026, 91 L. ed. 1234 has recognized that states may act "in the interval" before the federal agency establishes rules to make the federal law applicable, and on any question which may be considered a "distinct segment of the matter by the federal statute" when "the federal agency has not acted on that segment." (loc. cit. 330 U. S. 774) We believe the choice of a representative is a distinct segment of the federal regulation covered by the quoted words.

In this connection, we wish again to stress the fact that the supreme court of Wisconsin did not hold, as contended by the appellants, that the state board might conduct an election irrespective of whether the National Board had taken jurisdiction and irrespective of whether the action contravened any substantive provision of the National Act. As is obvious from a reading of the opinion of the supreme court of the State of Wisconsin, what it held was that the state board might assist the process of collective bargaining by using its facilities to ascertain facts, provided that the National Labor Relations Board *had not* taken jurisdiction of the same question, and provided that the state board *did not* exercise any discretion or act in any way which

might contravene a substantive policy of federal legislation.

The appellant, Local B-953, has cited two cases, *Linde Air Products Co. v. Johnson*, (1948) 77 Fed. Supp. 656 and *National Labor Relations Bd. v. Industrial Commission of Utah*, (1948) 15 Labor Cases, par. 64,626, in which certification proceedings by state boards were enjoined. We are glad to have those cases cited because they illustrate better than anything we can say the contrast between state legislation which seeks not only to frustrate policies of federal legislation but to supersede action of a federal agency in specific cases—and legislation like that of Wisconsin which not only provides that it shall, but is administered and interpreted to, supplement federal legislation in a subordinate capacity. In both of the above cited cases the National Board had not only taken jurisdiction (dismissing petitions because of failure of the petitioning union to comply with the non-communist provisions of the federal law) but had notified the state boards that their proposed actions were in substantive conflict with federal law. In the latter case, the National Board was concerned to the point of bringing the restraining action.

Wisconsin's board has followed federal policy, as it is authorized to do under the severability clause of its law as interpreted by the state supreme court, and has declined to extend the use of its facilities to organizations which fail to comply with the federal act. See *Crown Can Co.*, (1948) 22 LRRM 1369, 1370.

The Wisconsin board has operated in harmony with the federal board and hopes so to continue. The participation of the national board in the above cited cases, and its restraint from participation in the instant case, constitute

one of the fundamental distinctions between the two situations.

A situation in which there is a clash between a federal and a state agency, and in which the latter seeks to supersede the former and frustrate the policy of federal law, is in a totally different class from a case in which the challenge to state action is made by an individual and its effect, if successful, would be to frustrate the policy of both federal and state law.

III.

THE EFFECT OF THE ENACTMENT OF THE LABOR-MANAGEMENT RELATIONS ACT, 1947, AFTER THE STATE BOARD'S CERTIFICATION OF RESULTS OF THE ELECTION

The appellants have argued that differences in the terminology in parts of the Wisconsin Statutes, not here involved, and in certain parts of the National Labor Relations Act should be considered in order to invalidate the action of the state board. They have also laid great stress on sec. 10 (a) of the Labor-Management Relations Act, 1947, so that, while the state board's action was taken under one act, it must apparently meet challenges under both. To this we make no objection, although it would seem that certain matters must have become moot or academic by amendment of provisions which were advanced as a basis for argument on conflict (as in the discussion on pages 12 to 13 of the employer's brief). We have endeavored to explain under the last heading that there is no conflict in the provisions of the two laws involved in this case, and

that even as to the provisions not involved there is no conflict as they are administered and applied. Whatever differences there were between the National Labor Relations Act and the Wisconsin Employment Peace Act with respect to bargaining units and representatives have been substantially eradicated by the Labor-Management Relations Act, 1947 which decreased the area for exercise of discretion on such matters. Any differences in the policy of the two laws with respect to bargaining representative has been substantially minimized, if not eradicated. (See sec. 111.05, Wisconsin Statutes 1947, and sec. 9 Title I, Labor-Management Relations Act, 1947, 61 Stat. 143, 29 U. S. C. A. Supp. sec. 159).

Despite the greater uniformity of purpose and method between the present state and federal law on these questions the appellants argue that sec. 10 (a), 61 Stat. 146, 29 U. S. C. A. Supp. sec. 160 (a), (which is quoted on pages 16 to 17 of the brief of appellant, Local B-953, and pages 20 to 21 of the brief of the appellant employer), indicates that Congress intended under the earlier act to pre-empt the entire field of labor relations so as to leave no power in states to regulate at all. If this be true, it would mean that Congress intended by sec. 10 (a) to overrule this court's decision in *Consolidated Edison Co. v. National Labor Relations Bd.*, (1938) 305 U. S. 197, 83 L. ed. 126, 59 S. Ct. 206 which recognized some reserved power in states. If Congress had intended to overrule the guides laid down in that case, it would have altered its provisions which limit the jurisdiction of the national board to questions affecting commerce as previously defined. It made no change in those respects.

Instead, it provided for a ceding of jurisdiction in certain cases "even though such cases may involve labor disputes affecting commerce" which, under the definitions of

the act, mean disputes either arising *in* commerce or found as a fact by the board to tend to burden commerce, as in the *Consolidated Edison case, supra*. In other words, before the national board may "cede" jurisdiction it must first have taken jurisdiction by making the finding prerequisite to application of Title I of the Federal Act. In cases where it has taken jurisdiction it may then "cede" administration to states, where the industry is local in the sense that its operations are wholly within the boundaries of a state and not correlated with industries in other states, so that regulation in a single state may be effective. If the industry is not "local," in the sense that it may have manufacturing or assembly plants in several states so that bargaining units cross state lines and bargaining is done on an interstate basis, then the national board must handle its own administration.

We believe it is no accident that the term in sec. 10 (a) was changed from concede to cede. The term "cede" implies a turning over something which the federal agency has acquired and which could not be undertaken by a state agency without permission. The term concede more readily connotes an admission of a fact which would exist without the admission. We believe by the change in terminology Congress recognized two types of situation:

(1) Those in which the national board either automatically has jurisdiction (those arising *in* commerce) or has affirmatively taken jurisdiction (those found as a fact to *affect commerce*), in which it may "cede" jurisdiction;

(2) Those arising in intrastate commerce where there has been no affirmative finding that commerce is likely to be obstructed by the particular dispute, in which case there is no need for cession or concession because it has not been

taken out of the realm of reserved state power by the procedure prescribed by federal legislation.

The latter interpretation we deem would be essential to preserve the validity of sec. 10 (a). Surely, if Congress had completely extinguished state power in the first instance, it could not delegate to an administrative agency the power to recreate it by administrative fiat. There must be at least a scintilla of power left to the states by Congress, before there could be delegated to an administrative agency the authority to "cede" it in particular instances.

Congress has recognized a certain reserved power in states with respect to questions and practices arising in intrastate business which may be brought within the scope of the federal act by the necessary jurisdictional findings and then "ceded" for state administration in appropriate cases. That interpretation is borne out by the phrase "even though such cases may involve labor disputes affecting commerce" which indicates that its scope is limited to cases which have been brought within the scope of the federal law by observance of the jurisdictional prerequisites. The intent for a case-by-case cession is further borne out by the fact that the provision relating to consistency of state law does not apply to the law as a whole, but only to the "applicable provisions." What are the "applicable" provisions could not be determined except by evaluation of the specific case.

If there have as yet been no agreements under the authority of sec. 10 (a), it is primarily because its scope has not yet been clarified. Wisconsin has sought no agreement; but if any agreements are ever made under sec. 10 (a) there are no states which have laws more nearly consist-

ent, or whose objectives are more nearly identical with those of the federal legislation, than those of the state of Wisconsin.

Furthermore, as applied to this case, sec. 10 (a) would tend to establish that Congress did not *intend* to exclude states from conducting elections to reveal the desires of employees as to a bargaining representative, even if it were held that it does preclude states in the field of unfair practices.

The portion of that section quoted in the appellant's briefs follows upon the provision that the power of the national board shall be exclusive "to prevent any person from engaging in any unfair practice (listed in section 8)" 61 Stat. 146, 29 U. S. C. A. Supp. §160 (a). Whatever implication of preclusion there is in the section is expressly limited to prevention of the unfair practices enumerated. Under the well established principle of *"enumeratio unius est exclusio alterius,"* it would follow that if Congress provides that action should be precluded in one case, and fails to make such provision in another, such failure is indicative that it did not intend preclusion in the second case.

IV.

THE WISCONSIN EMPLOYMENT RELATIONS BOARD DID NOT DETERMINE ANY CONTRACT RIGHTS OF EMPLOYER AND EMPLOYEE

One of the specifications of error made by the appellant, La Crosse Telephone Company, is to the effect that the Wisconsin Employment Relations Board had no jurisdiction to determine contract rights of employer and employee where the employer is engaged in interstate commerce.

The question of interstate commerce has been heretofore covered, and this heading serves only to make the point that the Wisconsin board did not endeavor to litigate any contract rights or obligations as between the appellants or as between the appellants and other parties.

Its concern with the contract situation was solely in order to determine the best time for conducting an election to ascertain the wishes of the employees as to a collective bargaining representative for future negotiations, on the assumption that if a contract had been entered into which had a substantial term to run, the purposes of the employees might be better served by deferring the date of election.

The board's certification is not contended to have any efficacy to alter or even to affect any right or obligation under an existing contract. A certification made during an existing contract has the effect only to enable negotiations to be begun by the selected bargaining agent "a reasonable length of time prior to the expiration of the contract." The existence of a contract is not a bar to an elec-

tion under either state or federal procedure. Rather, the time which the contract has to run is to be considered only as it affects the probable date when negotiations for a new contract could and should be commenced.

In considering the question of previous collective bargaining contracts, the state board was concerned only in ascertaining facts for its guidance as to the best time for the conduct of an election to serve the interests of the parties. An election is not *invalid* by reason of being conducted during the existence of another contract, but only less serviceable from a practicable point of view if the contract has a substantial period to run. In determining how its factual investigation could best serve the parties, the board correctly applied the Wisconsin law with respect to the date of the acceptance of the 1946-7 contract between the employer and Local B-953, as is evidenced by the portion of the opinion of the Wisconsin Supreme Court appearing at pages 55 to 56 of the record.

The contract between the employer and Local B-953 was made in Wisconsin, for performance in Wisconsin, and regardless of whether the questions arise in a federal or state court, the questions relating to rights and obligations under the contract are determined according to the law of the forum in which it is made and performed. *Restatement of the Law of Conflict of Laws*, Sections 311, and 332.

CONCLUSION

The limitations heretofore drawn by this court upon state jurisdiction, with respect to regulation of labor relations in intrastate enterprises, are to the effect that a state may not frustrate an objective sought to be obtained by Congress, and that it may not cause a forfeiture of bargaining rights (*Bethlehem Steel Co. v. New York State Labor Rel. Bd.*, (1947) 330 U. S. 767, 67 S. Ct. 1026, 91 L. ed. 1234 and *Hill v. State of Florida*, (1945) 325 U. S. 538, 65 S. Ct. 1373, 89 L. ed. 1782.

In making such limitations, we do not believe the court intended to emasculate the power of states to the end of permitting private individuals to accomplish the very things which state governments are forbidden to do. The objective of this suit, in which the employer and Local B-953 collaborate, is to defeat the wishes of employees in an admittedly appropriate unit who voted 91 to 14 in favor of the Guild as their bargaining representative. It is one of the objectives of federal legislation to insure to employees the right to bargain through representatives of their own choosing. In saying that states have no power to frustrate that objective, surely this court did not intend to place private individuals in a position superior to that of state governments. The purpose of defining the respective areas for operation of state and federal government is to enable them to operate in proper coordination toward the same objectives and thus to win the respect and obedience of the peoples governed. A striking down of the power of state governments would be anomalous if its sole effect

were to enable the subjects of the government to frustrate governmental objectives in a manner in which a governmental division itself can not do.

Respectfully submitted,

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APPENDIX

The appendix to the brief of the appellant, Local B-953 quotes sec. 111.07 (10) of the Wisconsin Statutes with the apparent implication that it is applicable to the instant proceeding. It is not. It applies only to proceedings under sec. 111.07 (7) of the Wisconsin Statutes which provides in part:

> "If any person fails or neglects to obey an order of the board while the same is in effect the board may petition the circuit court of the county wherein such person resides or usually transacts business for the enforcement of such order and for appropriate temporary relief or restraining order, and shall certify and file in the court its record in the proceedings, including all documents and papers on file in the matter, the pleadings and testimony upon which such order was entered, and the findings and order of the board. * * *"

Such a proceeding is not here involved. No provision is made by law for "stay" of a certification of the results of an election because there is nothing to stay. The certification is not enforcible.

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In the Supreme Court of the United States

OCTOBER TERM, 1948

No. 38

LA CROSSE TELEPHONE CORPORATION, APPELLANT

v.

WISCONSIN EMPLOYMENT RELATIONS BOARD, L. E. GOODING, HENRY RULÆ AND J. E. FITZGIBBON, AS MEMBERS OF THE WISCONSIN EMPLOYMENT RELATIONS BOARD

No. 39

INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, LOCAL B–953, A. F. OF L., APPELLANT

v.

WISCONSIN EMPLOYMENT RELATIONS BOARD, L. E. GOODING, HENRY RULE AND J. E. FITZGIBBON, AS MEMBERS OF THE WISCONSIN EMPLOYMENT RELATIONS BOARD

ON APPEALS FROM THE SUPREME COURT OF THE STATE OF WISCONSIN

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

OPINIONS BELOW

The opinion of the Supreme Court of Wisconsin (R. 48) is reported in 251 Wis. 583 and 30

N. W. 2d 241. The opinion of the Circuit Court of La Crosse County (R. 1) and Wisconsin Employment Relations Board's Direction of Election (R. 15), its Accompanying Memorandum (R. 17), and its Certificate of Representatives (R. 12) are not officially reported.

JURISDICTION

The judgments of the court below were entered on December 23, 1947 (R. 58). Petitions for appeals to this Court were filed by the La Crosse Telephone Corporation (R. 59) and Local Union No. B–953 of the International Brotherhood of Electrical Workers, A. F. of L. (R. 63) on February 25, 1948, and were allowed the same day (R. 61, 66). The jurisdiction of this Court was invoked under Section 237 (a) of the Judicial Code, as amended, which has since been superseded by Section 1257 of 28 U. S. C., as codified June 25, 1948. On April 19, 1948, this Court entered orders postponing consideration of the question of jurisdiction until the hearing on the merits.

QUESTION PRESENTED

This brief is limited to discussion of the question on the merits, namely:

Whether, when the National Labor Relations Board has consistently exercised jurisdiction over questions concerning representation and charges of unfair labor practices involving employees of an employer admittedly engaged in commerce

within the meaning of Section 2 (6) of the National Labor Relations Act, and when the Board has consistently found that employers in the same industry, of comparable size and type of operation, are engaged in commerce within the meaning of the Act, a State may entertain a petition filed with it by a labor organization for the purpose of resolving a question concerning representation of such employees which is cognizable by the National Board, and certify a collective bargaining representative.

STATUTES INVOLVED

The appeals involve the National Labor Relations Act (Act of July 5, 1935, 49 Stat. 449, 29 U. S. C. 151, *et seq.*), and the National Labor Relations Act as amended by the Labor Management Relations Act, 1947 (61 Stat. 136, 29 U. S. C., Supp. I, 141, *et seq.*), herein sometimes called the National Act, and the Wisconsin Employment Peace Act (Ch. 111, Wisconsin Statutes, 1947), as amended, herein sometimes called the State Act. The pertinent provisions of the statutes are set forth in the appendices *infra*, pp. 15–34.

STATEMENT

La Crosse Telephone Corporation, hereinafter called the Company, operates a telephone business in La Crosse County, Wisconsin. It is a subsidiary of the Central Telephone Company, other

subsidiaries of which operate telephone businesses in Illinois, Virginia and many other states (R. 23). A telephone exchange at Park Ridge, Illinois, is managed from the La Crosse office of the Company (R. 24).[1]

The National Labor Relations Board has uniformly held that telephone companies of comparable size and mode of operation are subject to the National Act. See, e. g., *Matter of The Lorain Telephone Company*, 58 N. L. R. B. 478; *Matter of The People's Telephone Corporation*, 69 N. L. R. B. 540.

On May 3, 1941, the International Brotherhood of Electrical Workers, A. F. of L., Local B–953 (hereinafter called the Union), filed charges with the National Labor Relation Board (hereinafter called the National Board) alleging that the Company had violated Sections 8 (1) and (2) of the National Labor Relations Act. Thereupon the Union and the Company entered into a settlement agreement, approved by the regional director of the National Board, pursuant to which the Company posted the usual notices announcing that it would respect the requirements of the National Act and undertook to recognize the

[1] According to Moody's Manual of Utilities (1947), the gross revenue of the Company for the calendar year ended December 31, 1946 was $537,219. During the same year it handled 455,742 toll calls. It operates eight telephone exchanges in La Crosse County, Wisconsin and has approximately 150 employees.

Union as the collective bargaining representative of its plant and traffic department employees. The charges were then withdrawn.[2]

Sometime thereafter a collective bargaining agreement was entered into between the Company and the Union fixing the wages and terms and conditions of employment of employees in both departments. On December 19, 1945, the Company and the Union entered into a renewal of this or a succeeding collective bargaining agreement. The renewal agreement so entered into provided that it should become "effective as of the 1st day of December 1945 for a period of one year and [should] continue in full force and effect from year to year thereafter unless written notice [were] given by either party—to the other on or before ninety days prior to the annual expiration date requesting that the agreement be amended or cancelled." (R. 36.) By letter dated August 28, 1946 the Union notified the Company of its desire to amend the agreement (R. 22). New schedules of wages and hours were promptly agreed upon by the Company and representatives of the Union (R. 36, 38). The membership of the Union approved the schedules (R. 21–22), but rejected agreements incorporating them because

[2] The facts stated in this paragraph are not shown by the record, but are judicially noticeable. Cf. *Bowles* v. *United States*, 319 U. S. 33, 35; *Bethlehem Steel Company* v. *New York State Labor Relations Board*, 330 U. S. 767, 771.

of the absence of a clause permitting reconsideration of the wage rates prior to December 1, 1947 (R. 29). Thereafter the Company and representatives of the Union agreed upon a provision permitting reconsideration of the wage rates as of March 1, 1947 (R. 30). This was approved by the membership of the Union on September 25, 1946 and the Company was notified of the approval on September 27, 1946 (R. 22). The agreement of the Company and the Union to the amendments to collective bargaining agreement of December 19, 1945, although evidenced by correspondence (R. 24, 26, 27, 30) had not been formally engrossed prior to October 18, 1946.

Meanwhile, on September 20, 1946, the Telephone Guild of Wisconsin (hereinafter called the Guild) filed with the National Board a petition asserting that a question of representation affecting commerce existed with respect to all employees of the Company, and asking that the Board ascertain and certify the collective bargaining representative of such employees (R. 17). The National Board accepted the petition and notified the Company of its filing by a letter sent from its regional office at Minneapolis on September 24, 1946 (R. 25). On October 8, 1946, the Guild withdrew its petition and on the same day filed a petition seeking the same relief with the Wisconsin Employment Relations Board (R. 18–19).

The Wisconsin Board held a hearing on the petition (R. 18 *et seq.*), and directed that separate elections be conducted among the employees of plant, traffic and office departments of the Company for the purpose of determining whether the employees desired to be grouped in separate departmental units or in a single unit, and which representative, if any, they desired to select (R. 15). In ordering the elections the Wisconsin Board held that while the Company and the Union had on September 27, 1946 reached a collective bargaining agreement extending to December 1, 1947, the agreement had been arrived at after the Company had been notified (presumably by the letter sent to it by the National Board (R. 25)) that the Guild claimed to represent a majority of its employees (R. 17). Accordingly it held that the agreement did not bar an election (R. 17–18).

The elections were held as directed and the Wisconsin Board, on January 14, 1947, certified that as a result thereof, the employees in the plant and traffic departments had elected to combine in a single bargaining unit, and had chosen the Guild as their collective bargaining representative, and that the employees in the office department had elected to constitute themselves a separate unit and had chosen not to be represented by any collective bargaining representative (R. 12–15).

At no time during the proceedings before it did the Wisconsin Board make any inquiry as to.

whether the Company was engaged in interstate commerce.

Both the Company (R. 2) and the Union (R. 6) brought action in the Circuit Court of La Crosse County, Wisconsin, to have the certification set aside. Here it was admitted that the Company was engaged in interstate commerce in that it handled interstate telephone calls. In view of this concession, the Circuit Court on April 28, 1947 held, on the authority of *Bethlehem Steel Company* v. *New York Labor Relations Board*, 330 U. S. 767, that the Wisconsin Board was without jurisdiction to issue the certification (R. 1). Accordingly it entered judgment on May 8, 1947, setting aside the Board's certification (R. 11–12).

On May 5, 1947, after the Circuit Court had rendered its decision, the Guild filed a second petition for certification with the National Board. This petition was dismissed by the regional director on the ground that a then existing collective bargaining agreement between the Company and the Union constituted a bar to the relief sought. The Guild appealed to the National Board from the regional director's order. While the appeal was pending, the Guild, on August 4, 1947, withdrew its petition (Case No. 18–R–1882). Simultaneously with the withdrawal of this petition the Guild filed a third petition with the National Board, which, on February 9, 1948, was dismissed by the regional director for an insufficient showing of interest (Case No. 18–R–1946).

In the interim the Wisconsin Board, through the Attorney General of Wisconsin, appealed from the judgments of the Circuit Court vacating the Wisconsin Board's certification (R. 44, 45). On December 23, 1947, that court, while conceding that the Company rendered some interstate long distance service (R. 49), held that "although the National Board's power over the subject is paramount, it is not exclusive * * * until the federal power is exercised or jurisdiction thereto is taken as to particular employees" (R. 48–55). Accordingly it reversed the judgments of the Circuit Court with instructions to enter judgments sustaining the direction of election and certification of the results thereof (R. 57, 58–59).

ARGUMENT

THE NATIONAL LABOR RELATIONS ACT SUPERSEDES THE WISCONSIN EMPLOYMENT PEACE ACT AS APPLIED IN THIS CASE

I

We believe that the decision of this Court in the *Bethlehem* case requires reversal of the judgment below. In that case this Court rejected "a case by case test of federal supremacy", and held that where the National Board had exercised "jurisdiction of the industry" in which the particular employer is engaged there is no "room" left "for the operation of the state authority" (330 U. S., at p. 776). Here, as in the *Bethlehem* case, the employer has such a relation to interstate commerce that for the reasons stated in *National Labor*

Relations Board v. *Fainblatt*, 306 U. S. 601, federal power reaches its labor relations (cf. 330 U. S., at p. 773).[3] Here, as in that case, the employer is engaged in an industry over which the National Board has consistently exercised jurisdiction.[4] Here, as in that case, both the state and the federal governments have "laid hold of the same relationship for regulation, and it involves the same employers * * * and the same employees" 330 U. S., at p. 775. Here, as in that case, each government "has delegated to an administrative authority a wide discretion in applying this plan of regulation to specific cases" (*ibid.*).[5] Each administrative authority is "gov-

[3] The fact that the Company handles some interstate telephone calls, a fact conceded by both courts below (R. 1, 49), is enough to establish this. *National Labor Relations Board* v. *Central Missouri Telephone Co.*, 115 F. 2d 563 (C. C. A. 8); *National Labor Relations Board* v. *J. G. Boswell Co.*, 136 F. 2d 585 (C. C. A. 9).

[4] *Matter of The Elyria Telephone Co.*, 58 N. L. R. B. 402; *Matter of Newark Telephone Co.*, 59 N. L. R. B. 1408; *Matter of Ohio Telephone Service Co.*, 72 N. L. R. B. 488. See also cases cited note 3, *supra*.

[5] The contention that the Wisconsin Board acts in a purely ministerial capacity is plainly incorrect. For example, the Wisconsin Board was under a duty to determine whether the collective bargaining agreement between the Company and the Union barred an election for the purpose of choosing a collective bargaining representative. That duty was not ministerial but involved the highest degree of discretion. So too, the Wisconsin Board had to decide whether the Guild has shown a sufficient interest to justify holding an election. That duty clearly was not ministerial. While it is true that in determining the appropriateness of a collective bargaining

erned by * * * different standards" (*ibid.*). Here, the Wisconsin Board, like the New York Board in the *Bethlehem* case, is required to find craft units appropriate for collective bargaining purposes whenever a majority of employees in a particular craft so decide, whereas the National Board is under no such requirement. Compare, Section 111.02 (6) of the Wisconsin Act with Section 9 (b) of the National Act. It is also required, unlike the National Board, to find "department" units appropriate whenever by vote a majority of employees in a particular department so decide (*ibid.*). It was pursuant to this provision that the Wisconsin Board in this very case held separate elections among employees in the traffic and plant departments to determine whether they desired to constitute a single or two separate units (*supra*, p. 7).

Moreover, here, as in the *Bethlehem* case, the National Board has exercised jurisdiction over the specific employer and employees whose relations the state seeks to regulate. Long before the Wisconsin Board attempted to exercise jurisdiction, agents of the National Board had entertained charges of unfair labor practices filed against the

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unit (cf. Section 111.02 of the Wisconsin Act) and in certifying the winning union, the Wisconsin statute required the Wisconsin Board to be governed by the results of the election and left it almost no discretion, in those instances the Wisconsin statute itself deviated materially from the National Act, see *infra*, p. 11.

Company and had administratively procured a settlement of those charges which included an agreement by the Company to observe and respect the requirements of the National Law (pp. 4–5, *supra*). And after the Wisconsin Board assumed jurisdiction in this case, agents of the National Board entertained a petition filed by the Guild, the very union which invoked the jurisdiction of the Wisconsin Board in this case, and administratively dismissed the petition on the grounds that it was without merit.

As in the *Bethlehem* case, "there was no administrative concession that the nature of [the Company's] business put [its] employees beyond reach of federal authority" (330 U. S., at p. 775).

The only difference between the *Bethlehem* case and the companion case of *Allegheny-Ludlum Steel Corporation* v. *Kelley*, on the one hand, and the instant case, on the other, is that in both of the former cases the National Board had formally found in prior proceedings, wholly unconnected with those before the Court, that the Bethlehem and the Allegheny-Ludlum corporations were engaged in activities affecting commerce within the meaning of the National Act, whereas in the present case no such formal finding has been made with respect to the Company. We believe that this difference is immaterial. A contrary holding would, in effect, revert to the "case by case" test rejected by this Court in the *Bethlehem* case (330

U. S., at pp. 771, 776). It would permit state regulation of matters committed by Congress to the discretion of the National Board, where, as here, the National Board has consistently exercised jurisdiction and disposed on the merits of matters involving the same employer and employees, if only such disposition has been on an administrative basis, and the Board has not been required to issue a formal Decision and Direction of Election, Certification, or Order under Section 10 (e) of the Act, to dispose of them. The incompatibility of such an approach with the *Bethlehem* case is apparent from the fact that in that case this Court recognized that formulation by the Board of an administrative policy denying the appropriateness of bargaining units of foremen, was an effective exercise of jurisdiction over the subject matter of foremen units which precluded the states from dealing with that subject matter.

II

The recent amendment of Section 10 (a) of the National Labor Relations Act does not change the foregoing rule of the *Bethlehem* case.

Section 10 (a) now expressly provides that the Board may, by agreement with a State or Territorial agency, "cede to such agency jurisdiction over any cases in any industry (other than mining, manufacturing, communications, and transportation except where predominantly local

in character) even though such cases may involve labor disputes affecting commerce, unless the provision of the State or Territorial statute applicable to the determination of such cases by such agency is inconsistent with the corresponding provision of this Act or has received a construction inconsistent therewith."

Obviously nothing in this provision permits State agencies to act in situations, such as here, where the National Board has actually exercised jurisdiction over the labor relations of the employer.

Respectfully submitted.

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NOVEMBER 1948.

APPENDIX A

The pertinent provisions of the National Labor Relations Act (Act of July 5, 1935, 49 Stat. 449, 29 U. S. C. 151 *et seq.*) are as follows:

SECTION 1. The denial by employers of the right of employees to organize and the refusal by employers to accept the procedure of collective bargaining lead to strikes and other forms of industrial strife or unrest, which have the intent or the necessary effect of burdening or obstructing commerce by (a) impairing the efficiency, safety, or operation of the instrumentalities of commerce; (b) occurring in the current of commerce; (c) materially affecting, restraining, or controlling the flow of raw materials or manufactured or processed goods from or into the channels of commerce, or the prices of such materials or goods in commerce; or (d) causing diminution of employment and wages in such volume as substantially to impair or disrupt the market for goods flowing from or into the channels of commerce

The inequality of bargaining power between employees who do not possess full freedom of association or actual liberty of contract, and employers who are organized in the corporate or other forms of ownership association substantially burdens and affects the flow of commerce, and tends to aggravate recurrent business depressions, by depressing wage rates and the purchasing power of wage earners in industry and by preventing the stabilization of competitive wage rates and working conditions within and between industries.

Experience has proved that protection by law of the right of employees to organize and bargain collectively safeguards commerce from injury, impairment, or interruption, and promotes the flow of commerce by removing certain recognized sources of industrial strife and unrest, by encouraging practices fundamental to the friendly adjustment of industrial disputes arising out of differences as to wages, hours, or other working conditions, and by restoring equality of bargaining power between employers and employees.

It is hereby declared to be the policy of the United States to eliminate the causes of certain substantial obstructions to the free flow of commerce and to mitigate and eliminate the obstructions when they have occurred by encouraging the practice and procedure of collective bargaining and by protecting the exercise by workers of full freedom of association, self-organization, and designation of representatives of their own choosing, for the purpose of negotiating the terms and conditions of their employment or other mutual aid or protection.

* * * * *

SEC. 2. When used in this Act—

* * * * *

(2) The term "employer" includes any person acting in the interest of an employer, directly or indirectly, but shall not include the United States, or any State or political subdivision thereof, or any person subject to the Railway Labor Act, as amended from time to time, or any labor organization (other than when acting as an employer), or anyone acting in the capacity of officer or agent of such labor organization.

(3) The term "employee" shall include any employee, and shall not be limited to the employees of a particular employer, unless the Act explicitly states otherwise, and shall include any individual whose work has ceased as a consequence of, or in connection with, any current labor dispute or because of any unfair labor practice, and who has not obtained any other regular and substantially equivalent employment, but shall not include any individual employed as an agricultural laborer, or in the domestic service of any family or person at his home, or any individual employed by his parent or spouse.

* * * * *

(6) The term "commerce" means trade, traffic, commerce, transportation, or communication among the several States, or between the District of Columbia or any Territory of the United States and any State or other Territory, or between any foreign country and any State, Territory, or the District of Columbia, or within the District of Columbia or any Territory, or between points in the same State but through any other State or any territory or the District of Columbia or any foreign country.

(7) The term "affecting commerce" means in commerce, or burdening or obstructing commerce or the free flow of commerce, or having led or tending to lead to a labor dispute burdening or obstructing commerce or the free flow of commerce.

* * * * *

SEC. ~~4.~~ (a)

* * * * *

* * * The Board may establish or utilize such regional, local, or other agencies,

and utilize such voluntary and uncompensated services, as may from time to time be needed.

* * * * * *

SEC. 7. Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in concerted activities, for the purpose of collective bargaining or other mutual aid or protection.

SEC. 8. It shall be an unfair labor practice for an employer—

(1) To interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7.

(2) To dominate or interfere with the formation or administration of any labor organization or contribute financial or other support to it: *Provided,* That subject to rules and regulations made and published by the Board pursuant to section 6 (a), an employer shall not be prohibited from permitting employees to confer with him during working hours without loss of time or pay.

(3) By discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization: *Provided,* That nothing in this Act, or in the National Industrial Recovery Act (U. S. C., Supp. VII, title 15, secs. 701–712), as amended from time to time, or in any code or agreement approved or prescribed thereunder, or in any other statute of the United States, shall preclude an employer from making an agreement with a labor organization (not established, maintained, or assisted by any action defined in this Act as an unfair labor prac-

tice) to require as a condition of employment membership therein, if such labor organization is the representative of the employees as provided in section 9 (a), in the appropriate collective bargaining unit covered by such agreement when made.

(4) To discharge or otherwise discriminate against an employee because he has filed charges or given testimony under this Act.

(5) To refuse to bargain collectively with the representatives of his employees, subject to the provision of Section 9 (a).

* * * * *

SEC. 9. (a) Representatives designated or selected for the purposes of collective bargaining by the majority of the employees in a unit appropriate for such purposes, shall be the exclusive representatives of all the employees in such unit for the purposes of collective bargaining in respect to rates of pay, wages, hours of employment, or other conditions of employment: *Provided*, That any individual employee or a group of employees shall have the right at any time to present grievances to their employer.

(b) The Board shall decide in each case whether, in order to insure to employees the full benefit of their right to self-organization and to collective bargaining, and otherwise to effectuate the policies of this Act, the unit appropriate for the purposes of collective bargaining shall be the employer unit, craft unit, plant unit, or subdivision thereof.

(c) Whenever a question affecting commerce arises concerning the representation of employees, the Board may investigate such controversy and certify to the parties, in writing, the name or names of the repre-

sentatives that have been designated or selected. In any such investigation, the Board shall provide for an appropriate hearing upon due notice, either in conjunction with a proceeding under section 10 or otherwise, and may take a secret ballot of employees, or utilize any other suitable method to ascertain such representatives:

* * * * *

SEC. 10. (a) The Board is empowered, as hereinafter provided, to prevent any person from engaging in any unfair labor practice (listed in section 8) affecting commerce. This power shall be exclusive, and shall not be affected by any other means of adjustment or prevention that has been or may be established by agreement, code, law, or otherwise.

* * * * *

SEC. 14. Wherever the application of the provision of section 7 (a) of the National Industrial Recovery Act (U. S. C., Supp. VII, title 15, sec. 707 (a)), as amended from time to time, or of section 77B, paragraphs (l) and (m) of the Act approved June 7, 1934, entitled "An Act to amend an Act entitled 'An Act to establish a uniform system of bankruptcy throughout the United States' approved July 1, 1898, and Acts amendatory thereof and supplementary thereto" (48 Stat. 922, pars. (l) and (m)), as amended from time to time, or of Public Resolution Numbered 44, approved June 19, 1934 (48 Stat. 1183), conflicts with the application of the provisions of this Act, this Act shall prevail: *Provided*, That in any situation where the provisions of this Act cannot be validly enforced, the provisions of such other Acts shall remain in full force and effect.

APPENDIX B

The pertinent provisions of the Labor Management Relations Act of 1947 (61 Stat. 136, 29 U. S. C., Supp. I, 141, *et seq.*) are as follows:

SEC. 101. The National Labor Relations Act is hereby amended to read as follows:

* * * * *

"SEC. 2. When used in this Act—

* * * * *

"(6) The term 'commerce' means trade, traffic, commerce, transportation, or communication among the several States, or between the District of Columbia or any Territory of the United States and any State or other Territory, or between any foreign country and any State, Territory, or the District of Columbia, or within the District of Columbia or any Territory, or between points in the same State but through any other State or any Territory or the District of Columbia or any foreign country.

"(7) The term 'affecting commerce' means in commerce, or burdening or obstructing commerce or the free flow of commerce, or having led or tending to lead to a labor dispute burdening or obstructing commerce or the free flow of commerce.

* * * * *

"REPRESENTATIVES AND ELECTIONS

"SEC. 9. (a) Representatives designated or selected for the purposes of collective bargaining by the majority of the employees in a unit appropriate for such pur-

poses, shall be the exclusive representatives of all the employees in such unit for the purposes of collective bargaining in respect to rates of pay, wages, hours of employment, or other conditions of employment: *Provided,* That any individual employee or a group of employees shall have the right at any time to present grievances to their employer and to have such grievances adjusted, without the intervention of the bargaining representative, as long as the adjustment is not inconsistent with the terms of a collective-bargaining contract or agreement then in effect: *Provided further,* That the bargaining representative has been given opportunity to be present at such adjustment.

"(b) The Board shall decide in each case whether, in order to assure to employees the fullest freedom in exercising the rights guaranteed by this Act, the unit appropriate for the purposes of collective bargaining shall be the employer unit, craft unit, plant unit, or subdivision thereof: *Provided,* That the Board shall not (1) decide that any unit is appropriate for such purposes if such unit includes both professional employees and employees who are not professional employees unless a majority of such professional employees vote for inclusion in such unit; or (2) decide that any craft unit is inappropriate for such purposes on the ground that a different unit has been established by a prior Board determination, unless a majority of the employees in the proposed craft unit vote against separate representation or (3) decide that any unit is appropriate for such purposes if it includes, together with other employees, any individual employed as a guard to enforce against employees and

other persons' rules to protect property of the employer or to protect the safety of persons on the employer's premises; but no labor organization shall be certified as the representative of employees in a bargaining unit of guards if such organization admits to membership, or is affiliated directly or indirectly with an organization which admits to membership, employees other than guards.

"(c) (1) Whenever a petition shall have been filed, in accordance with such regulations as may be prescribed by the Board—

"(A) by an employee or group of employees or any individual or labor organization acting in their behalf alleging that a substantial number of employees (i) wish to be represented for collective bargaining and that their employer declines to recognize their representative as the representative defined in section 9 (a), or (ii) assert that the individual or labor organization, which has been certified or is being currently recognized by their employer as the bargaining representative, is no longer a representative as defined in section 9 (a); or

"(B) by an employer, alleging that one or more individuals or labor organizations have presented to him a claim to be recognized as the representative defined in section 9 (a);

the Board shall investigate such petition and if it has reasonable cause to believe that a question of representation affecting commerce exists shall provide for an appropriate hearing upon due notice. Such hearing may be conducted by an officer or employee of the regional office, who shall

not make any recommendations with respect thereto. If the Board finds upon the record of such hearing that such a question of representation exists, it shall direct an election by secret ballot and shall certify the results thereof.

"(2) In determining whether or not a question of representation affecting commerce exists, the same regulations and rules of decision shall apply irrespective of the identity of the persons filing the petition or the kind of relief sought and in no case shall the Board deny a labor organization a place on the ballot by reason of an order with respect to such labor organization or its predecessor not issued in conformity with section 10 (c).

"(3) No election shall be directed in any bargaining unit or any subdivision within which, in the preceding twelve-month period, a valid election shall have been held. Employees on strike who are not entitled to reinstatement shall not be eligible to vote. In any election where none of the choices on the ballot receives a majority, a run-off shall be conducted, the ballot providing for a selection between the two choices receiving the largest and second largest number of valid votes cast in the election.

"(4) Nothing in this section shall be construed to prohibit the waiving of hearings by stipulation for the purpose of a consent election in conformity with regulations and rules of decision of the Board.

"(5) In determining whether a unit is appropriate for the purposes specified in subsection (b) the extent to which the employees have organized shall not be controlling.

"(d) Whenever an order of the Board made pursuant to section 10 (c) is based in

whole or in part upon facts certified following an investigation pursuant to subsection (c) of this section and there is a petition for the enforcement or review of such order, such certification and the record of such investigation shall be included in the transcript of the entire record required to be filed under section 10 (e) or 10 (f), and thereupon the decree of the court enforcing, modifying, or setting aside in whole or in part the order of the Board shall be made and entered upon the pleadings, testimony, and proceedings set forth in such transcript.

"(e) (1) Upon the filing with the Board by a labor organization, which is the representative of employees as provided in section 9 (a), of a petition alleging that 30 per centum or more of the employees within a unit claimed to be appropriate for such purposes desire to authorize such labor organization to make an agreement with the employer of such employees requiring membership in such labor organization as a condition of employment in such unit, upon an appropriate showing thereof the Board shall, if no question of representation exists, take a secret ballot of such employees, and shall certify the results thereof to such labor organization and to the employer.

"(2) Upon the filing with the Board, by 30 per centum or more of the employees in a bargaining unit covered by an agreement between their employer and a labor organization made pursuant to section 8 (a) (3) (ii), of a petition alleging they desire that such authority be rescinded, the Board shall take a secret ballot of the employees in such unit, and shall certify the results thereof to

such labor organization and to the employer.

"(3) No election shall be conducted pursuant to this subsection in any bargaining unit or any subdivision within which, in the preceding twelve-month period, a valid election shall have been held.

"(f) No investigation shall be made by the Board of any question affecting commerce concerning the representation of employees, raised by a labor organization under subsection (c) of this section, no petition under section 9 (e) (1) shall be entertained, and no complaint shall be issued pursuant to a charge made by a labor organization under subsection (b) of section 10, unless such labor organization and any national or international labor organization of which such labor organization is an affiliate or constituent unit (A) shall have prior thereto filed with the Secretary of Labor copies of its constitution and bylaws and a report, in such form as the Secretary may prescribe, showing—

"(1) the name of such labor organization and the address of its principal place of business;

"(2) the names, titles, and compensation and allowances of its three principal officers and of any of its other officers or agents whose aggregate compensation and allowances for the preceding year exceeded $5,000, and the amount of the compensation and allowances paid to each such officer or agent during such year;

"(3) the manner in which the officers and agents referred to in clause (2) were elected, appointed, or otherwise selected;

"(4) the initiation fee or fees which new members are required to pay on be-

coming members of such labor organization;

"(5) the regular dues or fees which members are required to pay in order to remain members in good standing of such labor organization;

"(6) a detailed statement of, or reference to provisions of its constitution and bylaws showing the procedure followed with respect to, (a) qualification for or restrictions on membership, (b) election of officers and stewards, (c) calling of regular and special meetings, (d) levying of assessments, (e) imposition of fines, (f) authorization for bargaining demands, (g) ratification of contract terms, (h) authorization for strikes, (i) authorization for disbursement of union funds, (j) audit of union financial transactions, (k) participation in insurance or other benefit plans, and (l) expulsion of members and the grounds therefor;

and (B) can show that prior thereto it has—

"(1) filed with the Secretary of Labor, in such form as the Secretary may prescribe, a report showing all of (a) its receipts of any kind and the sources of such receipts, (b) its total assets and liabilities as of the end of its last fiscal year, (c) the disbursements made by it during such fiscal year, including the purposes for which made; and

"(2) furnish to all of the members of such labor organization copies of the financial report required by paragraph (1) hereof to be filed with the Secretary of Labor.

"(g) It shall be the obligation of all labor organizations to file annually with the Secretary of Labor, in such form as the Secretary of Labor may prescribe, reports bringing up to date the information required to be supplied in the initial filing by subsection (f) (A) of this section, and to file with the Secretary of Labor and furnish to its members annually financial reports in the form and manner prescribed in subsection (f) (B). No labor organization shall be eligible for certification under this section as the representative of any employees, no petition under section 9 (e) (1) shall be entertained, and no complaint shall issue under section 10 with respect to a charge filed by a labor organization unless it can show that it and any national or international labor organization of which it is an affiliate or constitutent unit has complied with its obligation under this subsection.

"(h) No investigation shall be made by the Board of any question affecting commerce concerning the representation of employees, raised by a labor organization under subsection (c) of this section, no petition under section 9 (e) (1) shall be entertained, and no complaint shall be issued pursuant to a charge made by a labor organization under subsection (b) of section 10, unless there is on file with the Board an affidavit executed contemporaneously or within the preceding twelve-month period by each officer of such labor organization and the officers of any national or international labor organization of which it is an affiliate or constituent unit that he is not a member of the Communist Party or affiliated with such party, and that he does not believe in, and is not a member of

or supports any organization that believes in or teaches, the overthrow of the United States Government by force or by any illegal or unconstitutional methods. The provisions of section 35 A of the Criminal Code shall be applicable in respect to such affidavits.

"PREVENTION OF UNFAIR LABOR PRACTICES

"SEC. 10. (a) The Board is empowered, as hereinafter provided, to prevent any person from engaging in any unfair labor practice (listed in section 8) affecting commerce. This power shall not be affected by any other means of adjustment or prevention that has been or may be established by agreement, law, or otherwise: *Provided*, That the Board is empowered by agreement with any agency of any State or Territory to cede to such agency jurisdiction over any cases in any industry (other than mining, manufacturing, communications, and transportation except where predominantly local in character) even though such cases may involve labor disputes affecting commerce, unless the provision of the State or Territorial statute applicable to the determination of such cases by such agency is inconsistent with the corresponding provision of this Act or has received a construction inconsistent therewith."

* * * * *

SEC. 104. The amendments made by this title shall take effect sixty days after the date of the enactment of this Act, except that the authority of the President to appoint certain officers conferred upon him by section 3 of the National Labor Relations Act as amended by this title may be exercised forthwith.

APPENDIX C

The pertinent provisions of the Wisconsin Employment Peace Act (Chapter 111, Wisconsin Statutes 1947 (C. 57 L. 1939, as amended by C. 515 L. 1939, C. 375, 465 L. 1943, C. 424, 504 L. 1945 and C. 2, 530 L. 1947) are as follows:

111.02 *Definitions.* When used in this subchapter—

* * * * *

(2) The term "employer" means a person who engages the services of an employe, and includes any person acting on behalf of an employer within the scope of his authority, express or implied, but shall not included the state or any political subdivision thereof, or any labor organization or anyone acting in behalf of such organization other than when it is acting as an employer in fact.

(3) The term "employe" shall include any person, other than an independent contractor, working for another for hire in the state of Wisconsin in a nonexecutive or nonsupervisory capacity, and shall not be limited to the employes of a particular employer unless the context clearly indicates otherwise; and shall include any individual whose work has ceased solely as a consequence of or in connection with any current labor dispute or because of any unfair labor practice on the part of an employer and (a) who has not refused or failed to return to work upon the final disposition of a labor dispute or a charge of an unfair labor practice by a tribunal having competent jurisdiction of the same or whose jurisdiction was accepted by the employe or his repre-

sentative, (b) who has not been found to have committed or to have been a party to any unfair labor practice hereunder, (c) who has not obtained regular and substantially equivalent employment elsewhere, or (d) who has not been absent from his employment for a substantial period of time during which reasonable expectancy of settlement has ceased (except by an employer's unlawful refusal to bargain) and whose place has been filled by another engaged in the regular manner for an indefinite or protracted period and not merely for the duration of a strike or lockout; but shall not include any individual employed in the domestic service of a family or person at his home or any individual employed by his parent or spouse or any employe who is subject to the federal railway labor act.

(4) The term "representative" includes any person chosen by an employe to represent him.

(5) "Collective bargaining" is the negotiating by an employer and a majority of his employes in a collective bargaining unit (or their representatives) concerning representation or terms and conditions of employment of such employes in a mutually genuine effort to reach an agreement with reference to the subject under negotiation.

(6) The term "collective bargaining unit" shall mean all of the employes of one employer (employed within the state), except that where a majority of such employes engaged in a single craft, division, department or plant shall have voted by secret ballot as provided in section 111.05 (2) to constitute such group a separate bargaining unit they shall be so considered, provided, that in appropriate cases, and to aid in the more efficient administration of

the employment peace act, the board may find, where agreeable to all parties affected in any way thereby, an industry, trade or business comprising more than one employer in an association in any geographical area to be a "collective bargaining unit". A collective bargaining unit thus established by the board shall be subject to all rights by termination or modification given by this subchapter I of chapter 111 in reference to collective bargaining units otherwise established under said subchapter. Two or more collective bargaining units may bargain collectively through the same representative where a majority of the employes in each separate unit shall have voted by secret ballot as provided in section 111.05 (2) so to do.

(7) The term "unfair labor practice" means any unfair labor practice as defined in section 111.06.

* * * * *

111.04 *Rights of employes.* Employes shall have the right of self-organization and the right to form, join or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in lawful, concerted activities for the purpose of collective bargaining or other mutual aid or protection; and such employees shall also have the right to refrain from any or all of such activities.

111.05 *Representatives and elections.* (1) Representatives chosen for the purposes of collective bargaining by a majority of the employes voting in a collective bargaining unit shall be the exclusive representatives of all of the employes in such unit for the purposes of collective bargaining, provided

that any individual employe or any minority group of employes in any collective bargaining unit shall have the right at any time to present grievances to their employer in person or through representatives of their own choosing, and the employer shall confer with them in relation thereto.

(2) Whenever a question arises concerning the determination of a collective bargaining unit as defined in section 111.02 (6), it shall be determined by secret ballot, and the board, upon request, shall cause the ballot to be taken in such manner as to show separately the wishes of the employes in any craft, division, department or plant as to the determination of the collective bargaining unit.

(3) Whenever a question arises concerning the representation of employes in a collective bargaining unit the board shall determine the representatives thereof by taking a secret ballot of employes and certifying in writing the results thereof to the interested parties and to their employer or employers. There shall be included on any ballot for the election of representatives the names of all persons submitted by an employe or group of employes participating in the election, except that the board may, in its discretion, exclude from the ballot one who, at the time of the election, stands deprived of his rights under this subchapter by reason of a prior adjudication of his having engaged in an unfair labor practice. The ballot shall be so prepared as to permit of a vote against representation by anyone named on the ballot. The board's certification of the results of any election shall be conclusive as to the findings included therein unless reviewed in the same manner

as provided by subsection (8) of section 111.07 for review of orders of the board.

* * * * *

111.06 *What are unfair labor practices.* (1) It shall be an unfair labor practice for an employer individually or in concert with others:

* * * * *

(d) To refuse to bargain collectively with the representative of a majority of his employes in any collective bargaining unit; provided, however, that where an employer files with the board a petition requesting a determination as to majority representation, he shall not be deemed to have refused to bargain until an election has been held and the result thereof has been certified to him by the board.

* * * * *

111.07 *Prevention of unfair labor practices.*

* * * * *

(8) The order of the board shall also be subject to review in the manner provided in chapter 227, except that the place of review shall be the circuit court of the county in which the appellant or any party resides or transacts business.

LIBRARY
SUPREME COURT, U.S

No. 39

IN THE

Supreme Court of the United States

October Term, 1948

INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, LOCAL B-953, A. F. of L.,

Appellant,

vs.

WISCONSIN EMPLOYMENT RELATIONS BOARD, ET AL.

ON APPEAL FROM THE SUPREME COURT OF WISCONSIN

BRIEF FOR THE COMMONWEALTH OF PENNSYLVANIA, AMICUS CURIAE

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No. 39

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1948

International Brotherhood of Electrical Workers, Local B-953, A. F. of L.

Appellant,

vs.

Wisconsin Employment Relations Board, et al.

ON APPEAL FROM THE SUPREME COURT OF WISCONSIN

BRIEF FOR THE COMMONWEALTH OF PENNSYLVANIA, AMICUS CURIAE

I. OPINION OF THE COURT BELOW

The opinion of the Supreme Court of the State of Wisconsin is reported in 256 Wis. 583, 30 N. W. 2d. 541 (1947).

II. STATEMENT AS TO JURISDICTION

The Commonwealth of Pennsylvania makes no claim, (and does not admit), that the instant case is one over which the Court has jurisdiction under the provisions of Section 237 of the Judicial Code, 28 U. S. C., section 344, 28 U. S. C. A. section 344. (Act of Congress of February 13, 1925, C. 229, section 1, 43 Stat. 937; Act of Congress of January 31, 1928, C. 14, section 1, 45 Stat. 54).

III. QUESTION PRESENTED

The only question discussed in this brief is:

Whether jurisdiction of the Wisconsin Employment Relations Board, the agency administering the Wisconsin Employment Peace Act (Wisconsin Laws of 1939, Chapter 57, as amended by Wisconsin Laws of 1943, Chapter 375, Wisconsin Laws of 1945, Chapter 424 and Wisconsin Laws of 1947, Chapter 2; Chapter 111, Sub-Chapter I of the Wisconsin Statutes, Sections 111.01 to 111.09) has been ousted by paramount federal authority in the instant case?

IV. STATUTES INVOLVED

The relevant provisions of the Labor Management Relations Act, 1947, (Act of June 23, 1947, Public Law 101, 80th Congress, 1st Session, 29 U.S.C.A. 151 et seq. (1947 Pocket Part)), are set forth in Appendix 1, infra, pp. 45-48. The relevant provisions of the Wisconsin Employment Peace Act, (Wisconsin Laws of 1939, Chapter 57, as amended by Wisconsin Laws of 1943, Chapter 375, Wisconsin Laws of 1945, Chapter 424 and Wisconsin Laws of 1947, Chapter 2; Chapter 111), are set forth in Appendix 2, infra, pp. 49-51.

V. STATEMENT OF THE CASE

On October 8, 1946, the Telephone Guild of Wisconsin petitioned the Wisconsin Employment Relations Board to conduct an election to determine the desires of employees of the La Crosse Telephone Corporation as to their collective bargaining representative. The State Board conducted a hearing as a part of the investigation.

The company had been bargaining with the Petitioner, International Brotherhood of Electrical Workers, Local B-953, A. F. of L., on behalf of its employees in its plant and traffic department, there having been a contract which, by its terms, expired on December 1, 1946 (R. 19, 20, 23), which contract had an automatic renewal provision (R. 36). Petitioner had notified the employer on August 28, 1946, of a desire to amend the contract (R. 22, 25).

Negotiations were undertaken between the company and an employees' committee for amendments, which resulted in the acceptance of a modified proposal (R. 27, 29, 30).

In the meantime, the Guild, which had received applications for membership among the company's employees constituting more than 30 percent of those eligible for membership (R. 19), had petitioned the National Labor Relations Board to be certified as bargaining representative of the employees represented previously by Petitioner.

On October 8, 1946, the Guild filed with the National Labor Relations Board a request to withdraw the petition previously submitted (R. 18, 19), and filed a petition for election with the Wisconsin Board. There is nothing in the record to indicate that the National Labor Relations Board has ever, in any manner, exercised any of its powers or discretion or, otherwise, taken jurisdiction of any question or phase of the La Crosse Telephone Corporation's employment relations with any of its employees (R. 53).

The State Board conducted an election on November 27, 1946, at which a majority of the employees in the unit, previously represented by Petitioner, indicated a desire to have the Guild as their representative for future bargaining (R. 12, 13, 14).

The State Board certified the results of the election on January 14, 1947.

VI. INTEREST OF THE COMMONWEALTH OF PENNSYLVANIA

The Commonwealth of Pennsylvania has a statute, commonly known as the "Pennsylvania Labor Relations Act", being the Act of June 1, 1937, P. L. 1168, to be found in 43 PS, sections 211.1 to 211.13 inclusive, which as enacted was virtually a transcript of the National Labor Relations Act of July 5, 1935. By reason of amendments to the Pennsylvania Labor Relations Act, the statutes became somewhat divergent with respect to procedural provisions, but the two acts remained identical as to objects and purposes. The Pennsylvania statute, at no point, is either contrary or repugnant to the policies of Congress as set forth in the National Labor Relations Act of 1935, or its successor, the Labor Management Relations Act, 1947. It does not deprive any employee, subject to the jurisdiction of state authority, of rights protected or guaranteed by federal legislation.

The Pennsylvania statute provides for administration under two broad classifications. The first class has to do with the ascertainment of an appropriate bargaining unit and the certification of the collective bargaining representatives who shall have been designated or selected by the majority of the employees in that unit. The second class is for the prevention of unfair labor practices. Thereunder

the agency hears complaints, states findings of fact, and may make "cease and desist" orders or other orders appropriate to the effectuation of the policies of the Act.

Under the Pennsylvania Labor Relations Act, being the Act of June 1, 1937, P. L. 1168, as originally enacted, the Pennsylvania Labor Relations Board could not have had jurisdiction over any labor dispute involving Company and its employees, as Company is engaged in interstate commerce within the meaning of the National Labor Relations Act. In construing the original act, prior to the amendment of May 27, 1943, the Supreme Court of Pennsylvania had held that where a labor dispute was one affecting interstate commerce, it was excluded from the jurisdiction of the state board by the terms of the act itself: *Abbotts Dairies, Incorporated, Case*, 341 Pa. 145, 146 (1941). However, the Act of May 27, 1943, P. L. 741; 43 PS Section 211.3, by its title, amends Section 3, clause (c) of the Act by "including persons subject to the National Labor Relations Act in the definition of 'employer'", and by striking the words "or the National Labor Relations Act, as amended from time to time," from the exclusions from the definition of "employer." Thereafter, the Pennsylvania Labor Relations Board exercised concurrent jurisdiction in certification cases, because the Courts of Common Pleas of Allegheny County and York County, Pennsylvania, had held that, *under the Act as amended, in the absence of an exercise of jurisdiction by the National Board; the Pennsylvania Labor Relations Board has jurisdiction over a proceeding to certify a bargaining agent for the employees of*

an employer who is engaged in interstate commerce: Petition of Equitable Gas Co., 51 D. & C. 653, 661 (1944); *York Telephone and Telegraph Company Employes Case*, 55 D. & C. 113, 118 (1945).

After the decision of Your Honorable Court in *Bethlehem Steel Company, et al. v. New York State Labor Relations Board*, 330 U. S. 767, which was decided April 7, 1947, the Supreme Court of Pennsylvania, on September 29, 1947, handed down a decision in *Pittsburgh Railways Company Substation Operators and Maintenance Employees' Case*, 357 Pa. 379, 54 A. 2d 891, wherein it was held that *the criterion to determine the validity of the exercise of state power is not whether the agency administering federal law has acted upon the relationship in a given case, but rather whether Congress has asserted its power to regulate that relationship.* It was held that the Pennsylvania Labor Relations Board could not constitutionally entertain the petition for the bargaining agent of the employes in that case, upon a record showing that the National Labor Relations Board had never assumed jurisdiction over the employer or any of its employees, on the theory that Congress had asserted its power of regulation, and jurisdiction in the National Labor Relations Board was exclusive.

As a result of this decision of Pennsylvania's highest appellate court, many cases upon appeal from final orders of the Pennsylvania Labor Relations Board are now pending in the courts of Pennsylvania and, in two instances, the Board has been restrained by courts of the United States

from making investigations commanded by the Pennsylvania statute in cases involving employees of Pennsylvania employers. See

Food, Tobacco, Agricultural and Allied Workers Union of America, Local 186, *etc. v. Smiley et al.*, 74 F. Supp. 823 (1946); 164 F. 2d 922 (1947);

United Office and Professional Workers of America v. Smiley et al., 77 F. Supp. 659 (1948).

Wherefore, Pennsylvania, like Wisconsin, has a vital interest in the question: How far and to what extent is the Pennsylvania agency barred from administering the state statute by reason of the enactment of the Labor Management Relations Act, 1947?

VII. SUMMARY OF ARGUMENT

(1) The Labor Management Relations Act, 1947, does not ipso facto preclude state legislation applicable to the same situations covered by the federal statute, as there is nothing in the record showing that the employer, La Crosse Telephone Corporation ever was a party to any proceeding before the National Labor Relations Board and never was before the National Board in any proceeding or manner. The instant case comes squarely within the rule that unless or until the National Board has elected to exercise its jurisdiction over the particular controversy involving the same issues before the State Board, the State Board is free to exercise its jurisdiction under the analogous or consistent provisions of the State Act.

It is the established rule that the jurisdiction of a federal agency and a state agency is concurrent whenever the state legislation does not contravene the provisions of the federal legislation, (absent a clear and manifest purpose of Congress, to the contrary), except where the jurisdiction of the federal agency has, in fact, been invoked or exercised in the particular matter in controversy before the state agency.

(2) *Bethlehem Steel Company et al. v. New York State Labor Relations Board*, 330 U. S. 767 (1947), has no application to the instant case as there is nothing in that

case to indicate an intended ruling that a state agency is without power to administer the state act with respect to charges of unfair labor practices against employers, employees or unions provided that the state policy is not contrary or repugnant to federal policy.

The Bethlehem Steel Company case is an application of the doctrine that state regulation cannot be permitted to frustrate national policy especially where, as in that case, federal policy was definitely adverse to foremen unionization and not merely neutral in the matter.

It is because the National Labor Relations Board has never formulated a distinct policy with respect to the employees of local communications companies such as the La Crosse Telephone Corporation that the Bethlehem Steel Company decision is not controlling in the instant case.

(3) Congress in enacting the Labor Management Relations Act 1947 did not intend to strike down the Wisconsin Employment Peace Act under the rule that the historic police powers of states are not to be superseded by a federal act unless that was the clear and manifest purpose of Congress. This is especially true of the Labor Management Relations Act, 1947, because the scope of federal power may not be extended so as to embrace effects upon interstate commerce so indirect and remote that to embrace them would effectually obliterate the distinction between what is national and what is local and create a completely centralized government.

(4) The Labor Management Relations Act, 1947, does not exhibit a clear and manifest purpose of Congress to

preclude the enforcement of state laws with respect to the investigation and certification of bargaining representatives.

As the purpose of the federal legislation is not primarily to regulate commerce but to secure and preserve industrial peace, it cannot be said that the federal interest is so dominant that the state be precluded from applying its own policy, when not inconsistent with federal policy, to secure and preserve industrial amity and good will.

Inasmuch as Wisconsin policy is neither contrary to, nor repugnant to federal policy, with respect to the determination of collective bargaining units, the holding of elections or the certification of bargaining representatives, the Wisconsin Employment Peace Act comes within the rule that the historic police powers of states are not to be superseded by a federal act unless that was the clear and manifest purpose of Congress.

The scheme of federal regulation provided for in the Labor Management Relations Act, 1947, should not be held to be so pervasive as to refuse to permit employees to select a bargaining agent under state authority.

The object sought to be obtained by the federal law and the character of obligations imposed by it do not show an intent on the part of Congress to bar the state agency from aiding the employees in the selection of their representative, especially as the order of certification imposes no obligation upon anyone and cannot be the subject of court review unless or until the state agency issues a future order which requires the employer to do something predicated upon the result of the election.

In view of the policy of the State of Wisconsin expressed in the Act, the Labor Management Relations Act, 1947, should not be held to impliedly evince an intent to strike down the Wisconsin statute or preclude its administration by the state agency.

(5) It is suggested that in this case no rule of constitutional law or statutory construction be applied which is broader than is required by the precise facts of the instant case; and that as neither the La Crosse Telephone Corporation, nor any of its employees have been subject to the jurisdiction of the National Labor Relations Board, the judgment of this Court below affirming the certification of a bargaining representative for the employees of the La Crosse Telephone Corporation in an appropriate unit should be affirmed because such proceeding was a valid exercise of the police power of Wisconsin.

VIII. ARGUMENT

(1)

The Labor Management Relations Act, 1947, does not ipso facto preclude state legislation applicable to the same situations covered by the federal statute.

In Petitioner's Brief, at page 7, it is said that "The National Labor Relations Board under the Wagner Act had exclusive jurisdiction of questions of representation affecting commerce," and that "The adoption of section 10(a) of the Labor Management Relations Act of 1947 shows that the Congress considers to be a reasonable solution to the problem of adjusting state and federal authority in the labor relations field. Congress has recognized the exclusive jurisdiction of the National Board and has provided for cession of such jurisdiction by the board under certain conditions and if the procedure of agreement between the state and national administrative agencies is followed."

The reasons urged by Petitioner to bar the states from exercising jurisdiction over labor disputes, if and when it is found that the employer is engaged in interstate commerce, or where the employer's operations affect interstate commerce, are substantially the same reasons which were urged to bar state jurisdiction during the

period that the National Labor Relations Act was in force and operation. The rule universally accepted by courts has been that the National Labor Relations Act did not ipso facto preclude state legislation applicable to the same situations covered by the federal statute. This rule was expressed in various ways. In *Davega City Radio, Inc. v. State Labor Relations Board*, 281 N. Y. 13, 22 N. E. 2nd 145, 147, 148, 149 (1939), a decision of the Court of Appeals of New York considering the New York State Labor Relations Act as originally enacted when it was virtually a transcript of the National Labor Relations Act, it was said by Finch, J., that (italics ours):

> "*From a study of authorities it does not appear that the National Labor Relations Act ipso facto precludes the State legislation applicable to the same situations.* * * * That the National Labor Relations Board is given exclusive jurisdiction under the National Act is of significance only in fixing the appropriate agency to enforce the National act, and is not relevant to the question whether a consistent State law may co-exist with a National Act.
>
> "*We reach the conclusion, therefore, that the State Labor Relations Board may enforce the State act at least until such time as it is ousted by the exercise by the National Labor Relations Board of its jurisdiction under the National act.* * * *"

In *Wisconsin Labor Relations Board v. Fred Rueping Leather Co.*, 228 Wis. 473, 279 N. W. 673, 677 (1938), wherein the Supreme Court of Wisconsin considered the

Wisconsin Labor Relations Act of 1937, which was repealed in 1939 when the Wisconsin Employment Peace Act was enacted, it was said by Wickham, J., that (italics ours):

> "It is not seriously contended that the Wisconsin act, which is conceded to be nearly identical both in purpose and method with the national act, discriminates against or unduly burdens interstate commerce. *The conclusion is inevitable that it constituted a valid exercise of the police power of this state even as to those labor relationships which fall within the commerce clause.* * * *"

In *Allen-Bradley Local No. 1111, etc. v. Wisconsin Employment Relations Board, et al.*, 237 Wis. 164, 295 N. W. 791 (1941), the contention was made that "The Wisconsin Act and the National Act both regulate the same subject; that the Wisconsin Act is so inconsistent with and in conflict with the National Act, in the public policy each Act seeks to enforce and in their major terms and provisions, that the two acts cannot consistently stand together, in so far as applicable to interstate commerce."

Chief Justice Rosenberry, in answering these contentions, said at page 800, that (italics ours):

> "Appellants specified nine ways in which the state and federal acts conflict but as already pointed out, *these conflicts do not exist until the National Labor Relations Act is applied by the National Labor Relations Board in a particular case. As has already been pointed out state power is not destroyed by federal*

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action, it is merely suspended in a particular case. If a man who owns and possesses a tool and is forbidden to use it, he still has the tool. He is deprived not of the tool but of the power to make use of it. The state is not deprived of its power to deal with labor relations by the National Labor Relations Act. Its power is suspended so far as is necessary to give effect to that act."

In *American Federation of Labor, et al. v. Reilly, et al.*, 113 Colo. 90, 155 P. 2d 145, 150, 151 (1944), a decision of the Supreme Court of Colorado, in a proceeding to test the constitutionality of the Colorado Labor Peace Act, which is patterned very closely on the Wisconsin Employment Peace Act, it was said by Knouse, J., with respect to *Allen-Bradley Local No. 1111 etc., et al. v. Wisconsin Employment Relations Board, et al.*, 315 U. S. 740 (1942), hereinafter considered in this brief (italics ours):

"* * * *the control which Congress, under the commerce clause, had asserted over the subject matter of labor disputes in passing the National Labor Relations Act, was not so pervasive or exclusive as to prevent Wisconsin, in the exercise of its police power, from enacting legislation regulating the type of employee or union activity involved in the challenged order, which was upheld. * * * Congress had 'designedly left open an area for state control,' and that conflicts between federal and state enactments, or orders arising therefrom, within that area should be resolved only upon 'concrete and specific issues raised by actual cases'.*"

Argument

There is nothing in the record which shows that the employer, LaCrosse Telephone Corporation was ever a party to any proceeding before the National Labor Relations Board. From all that appears of record, it has never been before the National Labor Relations Board in any proceeding or in any manner other than on some date prior to September 24, 1946, a petition for investigation and certification of bargaining representatives was filed with the National Labor Relations Board, which petition, on October 8, 1946 was withdrawn in order that the Wisconsin Employment Relations Board could conduct the election among the company's employes. By no stretch of the imagination can it possibly be concluded that federal jurisdiction was exercised and, accordingly, this case comes squarely within the rule succinctly stated in 174 A.L.R. 1071, 1072 (1948) that (italics ours):

> *"Unless or until the National Board has elected to exercise its jurisdiction under the national act over the particular controversy involving the same issues as those before the State board, the state board is free to exercise its jurisdiction under the analogous or consistent provisions of the state act. * * *"*
>
> *"And, conversely, it was held that the jurisdiction of the State Labor Relations Board may be ousted if the Federal Labor Relations Board has elected to exercise its jurisdiction over the particular matter in dispute under its authority under the national act. * * *".*

All judicial authority supports the view that the jurisdiction of a federal agency and a state agency is concurrent

whenever the state legislation does not contravene the provisions of the federal legislation—absent a clear and manifest purpose of Congress to the contrary—*except where the jurisdiction of the federal agency has in fact been invoked or exercised in the particular matter in controversy before the state agency*, and not the view expressed by the Supreme Court of Pennsylvania in *Pittsburgh Railways Company Substation Operators and Maintenance Employees case*, 357 Pa. 379, 54 A. 2d 891 (1947), of exclusive jurisdiction of the Federal agency unless or until federal jurisdiction is relinquished in favor of state jurisdiction. It was said by Chief Justice Hughes in *Kelly v. State of Washington*, 302 U. S. 1, 11 (1937), quoting from *Reid v. Colorado*, 187 U. S. 137, 149, 150 (1902), that (italics ours)

> "* * * *It should never be held that Congress intends to supersede, or by its legislation suspend, the exercise of the police powers of the states, even when it may do so, unless its purpose to effect that result is clearly manifested. This court has said—and the principle has been often reaffirmed that 'in the application of this principle the supremacy of an act of Congress in a case where the state law is but the exercise of a reserved power, the repugnance or conflict be direct and positive, so that the two acts could not be reconciled or consistently stand together'.*"

Clearly in point is *Allen-Bradley Local No. 1111, etc. et al. v. Wisconsin Employment Relations Board, et al.*, *supra*, wherein at page 741, it was said by Mr. Justice Douglas that (italics ours):

"*The sole question presented by this case is whether an order of the Wisconsin Employment Relations Board entered under the Wisconsin Employment Peace Act * * * is unconstitutional and void as being repugnant to the provisions of the National Labor Relations Act.* * * *"*

In this opinion, it was further stated by the Court at pages 745, 749 that (italics ours):

> "It was admitted that the company was subject to the National Labor Relations Act. The federal Board, however, had not undertaken in this case to exercise the jurisdiction which that Act conferred on it. Accordingly, the Supreme Court of Wisconsin upheld the order of the state Board stating that 'there can be no conflict between the acts until they are applied to the same labor dispute.' * * *
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> * * * * * *
>
> "* * * this Court has long insisted that 'an intention of Congress to exclude states from exerting their police power must be clearly manifested'. * * *"

Particularly in point is *Southern Pac. Co. v. State of Arizona*, 325 U. S. 761, 766 (1945), wherein Chief Justice Stone said (italics ours):

> "*Congress, in enacting legislation within its constitutional authority over interstate commerce, will not be deemed to have intended to strike down a state statute designed to protect the health and safety of the public unless its purpose to do so is clearly mani-*

*fested, * * * or unless the state law in terms or in its practical administration, conflicts with the Act of Congress, or plainly and palpably infringes its policy. * * *"*.

It has been held by Your Honorable Court that cease and desist orders of the Wisconsin Employment Relations Board, entered against unions and employees for the violation of the several unfair labor practices enumerated in Section 6 of the Wisconsin Employment Peace Act, were not unconstitutional and void as being repugnant to the provisions of the National Labor Relations Act of 1935:

Hotel & Restaurant Employees' International Alliance, Local No. 122 et al., v. Wisconsin Employment Relations Board et al., 315 U.S. 437 (1942);

Allen-Bradley Local No. 1111 etc., et al. v. Wisconsin Employment Relations Board et al., supra;

Wisconsin Employment Relations Board v. Milk & Ice Cream Drivers & Dairy Employees Union, Local No. 225, 238 Wis. 379, 299 N.W. 31 (1941), certiorari denied 316 U.S. 668 (1942);

Christoffel et al. v. Wisconsin Employment Relations Board et al., 243 Wis. 332, 10 N.W. 2d 197 (1943), certiorari denied 320 U.S. 776 (1943).

In the last mentioned case, wherein it was a matter of record that the union was the bargaining representative of the employees by virtue of a certification previously made by the National Labor Relations Board, it was said by Fowler, J., that (italics ours):

" • • • there was no conflict of jurisdiction because proceedings between the interested adverse parties had been before the national board involving matters not in issue before the state board."

The judgment of the Court below should be affirmed because "*the rights of employers and employees to conduct their economic affairs, and to compete with others for a share in the products of industry are subject to modification or qualification in the interests of the society in which they exist*" and because the certification procedure provided for in Section 111.05 of the Wisconsin Employment Relations Act is but an instance "*of the power of the State to set the limits of permissible contest open to industrial combatants.*":

Thornhill v. Alabama, 310 U.S. 88, 103, 104 (1940);

Carpenters and Joiners Union of America, Local No. 213 et al. v. Ritter's Cafe et al., 315 U. S. 722, 728 (1942).

Particularly in point is *International Brotherhood of Electrical Workers, Local No. 953, A. F. of L. v. Wisconsin Employment Relations Board et al.*, 245 Wis. 532, 15 N. W. 2d. 823 (1944), wherein it appears that the National Labor Relations Board had assumed jurisdiction in a certification case, and, before election, had dismissed the petition. Thereafter, the Wisconsin Board directed an election among the employees. Upon that factual basis, which is practically identical to the factual situation in the instant case, it was said by Chief Justice Rosenberry at pages 826, 827, 828, that: (Italics ours)

"This case is argued as if the National Labor Relations Board had entertained and proceeded under sec. 9(c) of the National Labor Relations Act and certified the name of I.B.E.W. as the bargaining representative of the employees of the company. We do not so interpret the decision of the National Labor Relations Board. *While in the course of its findings of fact it stated that I.B.E.W. was an appropriate bargaining agency, it did not make any certificate but on the contrary dismissed the proceeding.* We find nothing in the National Labor Relations Act that gives a mere recital or a finding of fact any efficacy. *In order to establish the union as the bargaining agent of the employees, an election must be held and the result duly certified as required by the act.* It is the certificate provided for under sec. 9(c) or an order under the provisions of sec. 10(c) that vitalizes the proceeding before the board. * * *

* * * * * * * * *

"*We are unable to see any conflict of policy between the National Labor Relations Act and the Employment Peace Act.*" * * *

"The policy is the same in both acts. *The method by which the bargaining agent is chosen differs but that does not constitute a difference in policy. If in a particular case the National Labor Relations Board takes jurisdiction of course its determination is superior in legal effect to that of the determination of the state board, if there is a conflict. In this case the National*

*"board having declined to take jurisdiction, there is no conflict in policy or method. * * * "*

The decision just cited is in harmony with all judicial decisions that concurrent jurisdiction exists until the National Labor Relations Board issues an order by which paramountcy of federal jurisdiction is established. For example, it was said by Minton, J., in the opinion of the United States Circuit Court of Appeals of the Seventh Circuit in *National Labor Relations Board v. Eclipse Moulded Products Co.*, 126 F. 2d 576, 578 (1942) that:

(Italics ours)

" * * The National Labor Relations Board in its proceedings is administering Federal law within the sovereign limits of the Federal Government, while the Wisconsin Board is administering Wisconsin law within the sovereign limits of Wisconsin. There are two sovereignties in the same territorial area.*

*There is not necessarily a conflict, as these two Boards operate in the same territory but in different spheres. Until conflict or interference between the two arises, there is no choice to be made as to which shall be paramount. The question of paramountcy is not determined by which one's jurisdiction was first invoked. Conflict may develop between the action of the State Board and that of the National Labor Relations Board that may require a determination of which shall be paramount. * * *"*

This also was the conclusion of the courts of Pennsylvania. For example, in a carefully considered opinion, it

was said by Sherwood, P. J., of the Court of Common Pleas of York County, Pennsylvania, *In Re York Corporation*, 55 District & County Reports (Pa.) 337, 342 (1945): (Italics ours)

> "Does conflict develop when the National Labor Relations Board orders an investigation, or does conflict develop only when the National Labor Relations Board makes an order determinative of the issues involved in the petition over which it assumes jurisdiction? *Judicial authority supports the contention that the Pennsylvania Labor Relations Board cannot be ousted of its jurisdiction, at least, until the National Labor Relations Board makes an order which is determinative of the issues involved in the proceeding before the Pennsylvania Labor Relations Board. It is only when there is a definitive order of the National Labor Relations Board that the question of paramountcy of jurisdiction arises. It would seem that the question of paramountcy of jurisdiction does not arise until the National Labor Relations Board issues a definitive order,* * *"

Undoubtedly, the Wisconsin Employment Relations Board properly issued a certification in the instant case, unless Your Honorable Court in *Bethlehem Steel Company et al. v. New York State Labor Relations Board*, 330 U.S. 767 (1947), has adopted a new canon of judicial construction of federal statutes which renders practically all previous judicial authority obsolete and without present effect.

(2)

The Bethlehem Steel Company decision has no application to the instant case.

In *Bethlehem Steel Company, et al. v. New York State Labor Relations Board, supra*, the appeals challenged the validity of the New York State Labor Relations Act as applied to a manufacturing corporation to permit unionization of foremen. However, there is nothing in the opinion of Mr. Justice Jackson in that case to indicate an intended ruling that a state agency is without power to administer the state act with respect to charges of unfair labor practices against employers, employees or unions, provided that the state policy is not contrary or repugnant to Federal policy. It was because of the decision in *Packard Motor Car Co. v. National Labor Relations Board*, 330 U.S. 485 (1947), holding that foremen have an absolute right to organize in foremen unions under the National Labor Relations Act, that the power of the New York agency to exercise jurisdiction over units limited to foremen did not exist. The sole objection to state jurisdiction in the Bethlehem Steel Company case was the oft repeated rule of Federal construction that, in a given case, state jurisdiction is ousted when the state statute, or state administration thereunder, "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress:"

Hines et al. v. Davidowitz et al., 312 U.S. 52, 66, 67 (1941);

Hill et al. v. State of Florida, 325 U.S. 538, 542 (1945).

It was said by Mr. Justice Jackson in

Bethlehem Steel Co. et al. v. New York State Labor Relations Board, supra, at page 776 (italics ours):

"• • • The federal board • • • asserts, and rightfully so, under our decision in the Packard case, supra, its power to decide whether these foremen may constitute themselves a bargaining unit. We do not believe this leaves room for the operation of the state authority asserted."

The contention of the Commonwealth of Pennsylvania has the support of the three well considered decisions of the Supreme Court of Wisconsin now before this Court for review.

In *Wisconsin Employment Relations Board v. Algoma Plywood & Veneer Co.*, 252 Wis. 549, 32 N.W. 2d 417, 420, 421 (1948), there is a comprehensive discussion of *Bethlehem Steel Co. v. New York State Labor Relations Board, supra.* It was said by Wickham, J., that (italics ours):

"We now come to the case of Bethlehem Steel Co. v. New York State Labor Relations Board, 330 U.S. 767, 67 S. Ct. 1026, 1028, 91 L. Ed. 1234. That case dealt with a situation in which the New York State Labor Board had permitted foremen to organize to constitute a collective bargaining unit. The question whether foremen should consistently with the policy of the national

act be organized as a bargaining unit had had various solutions by the National Board. In the beginning it had recognized the rights of the foremen and 'later, there was a period when, for policy reasons but without renouncing jurisdiction, it refused to approve foreman organization units.' The application of the foremen to the state board was the result of this policy on the part of the national board. *Later during the pendency of the case in the courts of the state of New York the Supreme Court in Packard Motor Car Company v. National Labor Relations Board,* 330 U.S. 485, 67 S. Ct. 789, 91 L. Ed. 1040, *had held that the national act entitled foremen to the rights of self-organization under the act.* The court in the Bethlehem case (330 U.S. 767, 67 S. Ct. 1030) follows the decision in the Allen-Bradley case to the effect that in the national act congress has 'sought to reach some aspects of the employer-employee relations out of which such inferences arise. * * * Where it leaves the employer-employee relation free of regulation in some aspects, it implies that in such matters federal policy is indifferent, and since it is indifferent to what the individual of his own volition may do we can only assume it to be equally indifferent to what he may do under compulsion of the state,' citing the Allen-Bradley case. It was held, however, following the case of Hill v. State of Florida, 325 U.S. 538, 65 S. Ct. 1373, 89 L. Ed. 1782, that 'the power of the state may not so deal with matters left to its control as to stand "as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress" '. *The court concluded that*

where Congress had implemented the act by the delegation of rulemaking power to an administrative body and where that body in the exercise of its delegated power has adopted a rule of policy the state power is abrogated, at least so far as the subject matter of the rule is concerned. While the state regulation in some fields may be invalid even though a particular phase of the subject has not been covered by rule it was held that where the measure in question relates to what might be considered a separate or distinct segment of the matter, the states are generally permitted to exercise their police power as to the matters omitted by the administrative rules. It is said, however, that 'the conclusion must be otherwise where failure of the federal officials affirmatively to exercise their full authority takes on the character of a ruling that no such regulation is appropriate or approved pursuant to the policy of the statute.' The court points out that the failure of the National Labor Relations Act to entertain the foremen's petitions was of the latter class; that the board had never denied its jurisdiction over the petitions and had made it clear that its refusal to designate foremen's bargaining units 'was a determination and an exercise of its discretion to determine that such units were not appropriate for bargaining purposes.' The court then says:

'The State argues for a rule that would enable it to act until the federal board had acted in the same case. But we do not think that a case by case test of federal supremacy is permissible here. The federal board has jurisdiction of the industry in which these particular

employers are engaged and has asserted control of their labor relations in general. * * * We do not believe this leaves room for the operation of the state authority asserted.' * * *

The Bethlehem case has limited the case-by-case doctrine commonly attributed to the Wisconsin decisions only to the extent of holding that where there has been a valid general exercise of its administrative power by the National Labor Relations Board neither repugnant provisions of the state law nor repugnant policies of the state board are effective to defeat the purpose and policy of the exercise. See 'The Taft-Hartley Act and State Jurisdiction Over Labor Relations', Russel A. Smith, 46 Michigan Law Review 593 at page 609, where in commenting upon the Bethlehem case it is said:

'On its facts the case is easily understood simply as an application of the doctrine that state regulation cannot be permitted to frustrate national policy — in this situation a policy definitely adverse to foremen unionization, not merely neutral in the matter'."

For reasons so clearly stated in the decision last cited, "a case by case test of federal supremacy", which is not permissible in a certification case where federal authority has been asserted over a group or class of employees, such as foremen of an industrial establishment, which group or class is capable of constituting an "aspect" of the general employer-employee relationship, or "a separable or distinct segment" of the general employer-employee relationship, is permissible in a case, like the instant case, where no

specific group or class of employees is involved wherein it can be said that federal authority has been asserted. The instant case is analogous to the situation which prevailed among foremen when, for policy reasons but without renouncing jurisdiction, the National Labor Relations Board refused to approve foremen organization units: *Bethlehem Steel Company v. New York State Labor Relations Board, supra,* at page 770.

It is because the Notional Labor Relations Board has never formulated a distinct policy with respect to the employees of local communications companies, such as the La Crosse Telephone Corporation, that the Bethlehem Steel Company decision is not controlling in the instant case.

(3)

Congress in enacting the Labor Management Relations Act, 1947, did not intend to strike down the Wisconsin Employment Peace Act.

In *Rice et al. v. Santa Fe Elevator Corporation et al.*, 331 U.S. 218, 230 (1947), after stating the dominant Federal canon for the construction of Federal statutes, to wit: "*the historic police powers of States (are) not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress,*" Mr. Justice Douglas says that the purpose of Congress may be evidenced in several ways. Four ways are specified as follows:

1. "The scheme of federal regulation may be so pervasive as to make reasonable the inference that Congress left no room for the States to supplement it."

2. "The Act of Congress may touch a field in which the federal interest is so dominant that the federal system will be assumed to preclude enforcement of state laws on the same subject."

3. "The object sought to be obtained by the federal law and the character of obligations imposed by it may reveal the same purpose."

4. "The State policy may produce a result inconsistent with the objective of the federal statute."

It cannot be said that the scheme for federal regulation provided in the Labor Management Relations Act, 1947, is

so pervasive as to make reasonable an inference that Congress left no room for Wisconsin to supplement it. It is as true of the Labor Management Relations Act, 1947, as it was of the National Labor Relations Act of 1935, that Congress intended "to exercise whatever power is constitutionally given to it to regulate commerce by the adoption of measures for the prevention or control of certain specified acts—unfair labor practices — which provoke or tend to provoke strikes or labor disturbances affecting interstate commerce:" *National Labor Relations Board v. Fainblatt et al.*, 306 U.S. 601, 607 (1939). Where Congress intends to prevent strikes or labor disturbances through a regulation of commerce, it can not be presumed that Congress intended to prevent Wisconsin from preventing strikes or labor disturbances within its borders by the same processes which Congress has approved.

Certainly the Wisconsin statute may exist and be administered by the state agency because as was said by Chief Justice Hughes in *National Labor Relations Board v. Jones & Laughlin Steel Corporation*, 301 U.S. 1, 37 (1937). (italics ours):

> "* * * Undoubtedly the scope of this power must be considered in the light of our dual system of government and may not be extended so as to embrace effects upon interstate commerce so indirect and remote that to embrace them, in view of our complex society, would effectually obliterate the distinction between what is national and what is local and create a completely centralized government. * * * The question is necessarily one of degree. * * *"

(4)

The Labor Management Relations Act, 1947, does not exhibit a clear and manifest purpose of Congress to preclude the enforcement of state laws with respect to the investigation and certification of bargaining representatives.

The Wisconsin Labor Relations Act of 1937 and its successor, the Wisconsin Employment Peace Act, like the Pennsylvania Labor Relations Act, have been in force and effect since 1937. There has been little or no conflict between the Federal agency and the state agencies with respect to administration. Doubtless this absence of conflict has resulted from the fact that there is a relatively small twilight zone wherein conflict could normally have arisen. The National Labor Relations Board has unquestioned jurisdiction over the large employers of industry whose activities are nation-wide in scope. In the main, the state agencies have assumed jurisdiction over labor disputes where the employer is engaged in a business which is essentially local, or, at least, where the labor dispute among the employees of a large employer is limited to employees who work within the confines of the state, and only then, when Federal jurisdiction has not been invoked with respect to the state employees.

As the purpose of the Federal legislation is not primarily to regulate commerce, but to secure and preserve

industrial peace, it can not be said that the Federal interest is so dominant that the state be precluded from applying its own policy, when not inconsistent with Federal policy, to secure and preserve industrial amity and good will.

The Labor Management Relations Act, 1947, is not analogous to the Alien Registration Law of 1940, by which a standard for alien registration in a single integrated and all-embracing system was provided. In that instance, the Federal interest was so dominant as to preclude enforcement of the Pennsylvania Alien Registration Act: *Hines et al. v. Davidowitz et al., supra.* Neither is the Labor Management Relations Act, 1947, analogous to the United States Warehouse Act regulating warehouses engaged in the storage of grain for interstate or foreign commerce. Such warehouses were clearly in the Federal domain, and in that Act, Congress exerted such a pervasive regulatory authority as to prove a legislative intent to make the legislation all embracing and exclusive, as was held in *Rice et al. v. Santa Fe Elevator Corp., et al., supra.* These and like cases are to be distinguished from the instant case because it is apparent that if Wisconsin, Pennsylvania, and other states having labor relations acts patterned upon the Federal statute, are to be prohibited from administering the state statutes, there will be a substantially large number of labor disputes, some of which may impair or interrupt the free flow of commerce, which can not be the subject of administrative relief, either Federal or state.

Inasmuch as there has been complete cooperation between the Federal agency and the state agencies in achieving the remedial purposes of the Federal legislation,

this is a situation which calls for the application of the rule stated by Mr. Justice Frankfurter in *Union Brokerage Co. v. Jensen et al.*, 322 U.S. 202, 209 (1944), that (italics ours):

"* * * *Where the Government has provided for collaboration the courts should not find conflict.* * *"

A comparison of Section 9 of the Labor Management Relations Act, 1947, to be found on pages 45-48 of this brief, with the provisions of Section 111.05 of the Wisconsin Employment Relations Act, to be found on pages 49-51 of this brief, will show that Wisconsin policy is neither contrary to nor repugnant to Federal policy, with respect to the determination of collective bargaining units, the holding of elections or the certification of bargaining representatives. This fact calls for the application of the rule that "the historic police powers of states are not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress."

It should be noted in this connection that Section 10 (a) of the Labor Management Relations Act, 1947, which provides for the ceding of jurisdiction by the National Labor Relations Board to a state agency, under certain circumstances, applies only to charges of unfair labor practice. There is nothing in the Labor Management Relations Act, 1947, which gives the National Labor Relations Board the power to cede jurisdiction in a certification proceeding. Neither is there anything in the Labor Management Relations Act, 1947, which expressly confers exclusive jurisdiction in certification proceedings upon the National Labor Relations Board or excludes a state agency from exercising concurrent jurisdiction.

Applying to the instant case, the rule laid down in *Rice et al. v. Santa Fe Elevator Corporation et al.*, that other than by expressed language, the purpose of Congress to exclude state jurisdiction may be evidenced in four specific ways, we will consider the first, namely: "the scheme of Federal regulation may be so pervasive as to make reasonable the inference that Congress left no room for the states to supplement it."

We are here considering a provision which does not directly affect commerce at all. Neither does it affect the rights of employers who are engaged in interstate commerce. It has been said that "a certification proceeding is of a nonadversary, fact finding character in which the Board plays the part of a disinterested investigator seeking merely to ascertain the desires of the employees as to their representation:" *Southern S. S. Co. v. National Labor Relations Board*, 120 F. 2nd 505, 506, 507 (1941). "The function of the Board and the employer, therefore, in these hearings is merely to develop the facts relating to the right of the single claimant to speak for all the employees. The only persons directly affected by the Board's finding that there is a majority are the employees who have not authorized the union to speak for them:" *National Labor Relations Board v. National Mineral Co.*, 134 F. 2d 424, 426 (1943). "Generally representation and unfair practice proceedings are distinct, both in issues and in the relief sought. Procedure and evidence also differ. But they may and often do overlap. Representation may be involved and determined in unfair practice proceedings * * * and unfair practices may affect representation. * * * Nothing in the

section specifies the time at which the conjunction must take place or limits the Board's power to making it prior to an order for an election or any other step short of final decision in the representation proceeding." *Warehousemen's Union, etc. v. National Labor Relations Board*, 121 F. 2d 84, 94 (1941).

Certainly the scheme of Federal regulation provided for in the Labor Management Relations Act, 1947, should not be held to be so pervasive as to refuse to permit employees to select a bargaining agent under state authority.

For the same reason, it cannot be said that the Act of Congress touches a field in which the Federal interest is so dominant that the Federal system will be assumed to preclude enforcement of state laws by which a state agency is empowered to assist state employees to determine their bargaining agency.

The objects sought to be obtained by the Federal law and the character of obligations imposed by it do not show an intent on the part of Congress to bar the state agency from aiding the employees in the selection of their representative. In this connection, it should be noted that the certification of bargaining representative imposes no obligation upon anyone. All that any labor board can do in a certification proceeding is certify. Strictly speaking, a so-called order of certification is merely a certification of the result of an election made by the Board to the employer and the interested employees, and there can be no Court review of the certification unless or until the Board issues

a future order which requires the employer to do something predicated upon the result of the election. *National Labor Relations Board v. Falk Corporation*, 308, U.S. 453; 459 (1940).

It is inconceivable that Congress intended that such an order could only be made by the National Labor Relations Board.

The instant case calls for the application of the rule laid down in *Union Brokerage Co. v. Jensen et al., supra*, at page 212, wherein it was said by Mr. Justice Frankfurter that (italics ours):

> "*The Commerce Clause does not deprive Minnesota of the power to protect the special interest that has been brought into play by Union's localized pursuit of its share in the comprehensive process of foreign commerce.* * * *By its own force that Clause does not* * * *preclude a State from giving needful protection to its citizens in the course of their contacts with business conducted by outsiders when the legislation by which this is accomplished is general in its scope, is not aimed at interstate or foreign commerce, and involves merely burdens incident to effective administration.* * * *"*

The Wisconsin Employment Peace Act is to be distinguished from the Florida statute requiring labor unions to make certain reports and obtain a license because such a statute conflicted with the National Labor Relation Act which required an employer to bargain with a properly selected union agent despite his failure to secure a Florida

license: *Hill et al. v. State of Forida, supra.* It is also to be distinguished from *American Federation of Labor et al. v. Watson*, 327 U.S. 582 (1946), wherein the Attorney General of Florida and others were enjoined enforcement of a constitutional provision of the State of Florida which provided that the right of persons to work shall not be denied or abridged on account of membership or non-membership in a labor organization, unless such provisions should be construed by the courts of Florida not to deny or abridge the right of employees, through their representative, to bargain collectively with their employer. The ground of these decisions and many others of like character all rest on the proposition that state legislation shall not contravene federal policy. The Wisconsin statute, to the contrary, does not stand as an obstacle to the federal policy of collective bargaining. It encourages collective bargaining by affording a method by which employees may choose their representative and compel the employer to bargain collectively. It should not be ruled that the Wisconsin statute is unconstitutional or void on the theory that it is contrary or repugnant to federal policy.

Furthermore, the Wisconsin Employment Relations Act declares in Section 111.01(4) that "It is the policy of the state, in order to preserve and promote the interests of the public, the employee and the employer alike, to establish standards of fair conduct in employment relations and to provide a convenient, expeditious and impartial tribunal by which these interests may have their respective rights and obligations adjusted. While limiting individual and group rights of aggression and defense, the state sub-

stitutes processes of justice for the more primitive method of trial by combat." It is clear and certain that the Labor Management Relations Act, 1947, should not be held to impliedly evince an intent to strike down the Wisconsin statute or preclude its administration by the Wisconsin Employment Relations Board, in view of the public policy proclaimed in the Wisconsin Employment Peace Act,

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(5)

CONCLUSION

It is urged that consideration of the instant case should be upon the facts of the case, in harmony with the long established rule that constitutional questions will be dealt with only as they are appropriately raised upon a record before the court:

Allen-Bradley Local No. 1111 etc., et al. v. Wisconsin Employment Relations Board, supra;

Tennessee Publishing Co. v. American National Bank, et al., 299 U.S. 18 (1936),

and that a court should not "formulate a rule of constitutional law broader than is required by the precise facts to which it is to be applied:"

Alabama State Federation of Labor, etc., et al. v. MacAdory et al., 325 U.S. 450 (1945);

International Shoe Co. v. State of Washington, etc., et al., 326 U.S. 310 (1945).

Inasmuch as neither the La Crosse Telephone Corporation nor any of its employees have been subject to the jurisdiction of the National Labor Relations Board, the certification of a bargaining representative for the employees of the La Crosse Telephone Corporation in an appropriate unit was a valid exercise of the police power of Wisconsin. Accordingly, the judgment of the Court below should be affirmed.

Respectfully submitted,

GEORGE L. REED,
Solicitor, Pennsylvania Labor Relations Board,

M. LOUISE RUTHERFORD,
Deputy Attorney General of Pennsylvania,

T. MCKEEN CHIDSEY,
Attorney General of Pennsylvania.

APPENDIX 1.

The pertinent provision of the Labor Management Relations Act, 1947, is Section 9, to be found in 29 U.S.C.A., Section 159 (pocket part), which is as follows:

Section 159. Representatives and elections — Exclusive representatives, employees', adjustment of grievances directly with employer

(a) Representatives designated or selected for the purposes of collective bargaining by the majority of the employees in a unit appropriate for such purposes, shall be the exclusive representatives of all the employees in such unit for the purposes of collective bargaining in respect to rates of pay, wages, hours of employment, or other conditions of employment: Provided, That any individual employee or a group of employees shall have the right at any time to present grievances to their employer and to have such grievances adjusted, without the intervention of the bargaining representative, as long as the adjustment is not inconsistent with the terms of a collective-bargaining contract or agreement then in effect: Provided further, That the bargaining representative has been given opportunity to be present at such adjustment.

DETERMINATION OF BARGAINING UNIT BY BOARD

(b) The Board shall decide in each case whether, in order to assure to employees the fullest freedom in exercis-

ing the rights guaranteed by this sub-chapter, the unit appropriate for the purposes of collective bargaining shall be the employer unit, craft unit, plant unit, or subdivision thereof: Provided, That the Board shall not (1) decide that any unit is appropriate for such purposes if such unit includes both professional employees and employees who are not professional employees unless a majority of such professional employees vote for inclusion in such unit; or (2) decide that any craft unit is inappropriate for such purposes on the ground that a different unit has been established by a prior Board determination, unless a majority of the employees in the proposed craft unit vote against separate representation or (3) decide that any unit is appropriate for such purposes if it includes, together with other employees, any individual employed as a guard to enforce against employees and other persons rules to protect property of the employer or to protect the safety of persons on the employer's premises; but no labor organization shall be certified as the representative of employees in a bargaining unit of guards if such organization admits to membership, or is affiliated directly or indirectly with an organization which admits to membership, employees other than guards.

Hearings on questions affecting commerce; rules and regulations

(c) (1) Whenever a petition shall have been filed, in accordance with such regulations as may be prescribed by the Board—

(A) by an employee or group of employees or any individual or labor organization acting in their behalf

alleging that a substantial number of employees (i) wish to be represented for collective bargaining and that their employer declines to recognize their representative as the representative defined in subsection (a) of this section, or (ii) assert that the individual or labor organization, which has been certified or is being currently recognized by their employer as the bargaining representative, is no longe a representative as defined in subsection (a) of this section; or

(B) by an employer, alleging that one or more individuals or labor organizations have presented to him a claim to be recognized as the representative defined in subsection (a) of this section;

the Board shall investigate such petition and if it has reasonable cause to believe that a question of representation affecting commerce exists shall provide for an appropriate hearing upon due notice. Such hearing may be conducted by an officer or employee of the regional office, who shall not make any recommendations with respect thereto. If the Board finds upon the record of such hearing that such a question of representation exists, it shall direct an election by secret ballot and shall certify the results thereof.

(2) In determining whether or not a question of representation affecting commerce exists, the same regulations and rules of decision shall apply irrespective of the identity of the persons filing the petition or the kind of relief sought and in no case shall the Board deny a labor organization a place on the ballot by reason of an order with respect to such labor organization or its predecessor not issued in conformity with section 160 (c) of this title.

(3) No election shall be directed in any bargaining unit or any subdivision within which in the preceding twelve-month period, a valid election shall have been held. Employees on strike who are not entitled to reinstatement shall not be eligible to vote. In any election where none of the choices on the ballot receives a majority, a run-off shall be conducted, the ballot providing for a selection between the two choices receiving the largest and second largest number of valid votes cast in the election.

(4) Nothing in this section shall be construed to prohibit the waiving of hearings by stipulation for the purpose of a consent election in conformity with regulations and rules of decision of the Board.

(5) In determining whether a unit is appropriate for the purposes specified in subsection (b) of this section the extent to which the employees have organized shall not be controlling. * * *

APPENDIX 2

The pertinent provision of the Wisconsin Employment Peace Act (Wisconsin Laws of 1939, Chapter 57, as amended) is Section 111.05 which relates to representatives and elections and is as follows:

111.05 Representatives and elections. (1) Representatives chosen for the purposes of collective bargaining by a majority of the employes voting in a collective bargaining unit shall be the exclusive representatives of all of the employes in such unit for the purposes of collective bargaining, provided that any individual employe or any minority group of employes in any collective bargaining unit shall have the right at any time to present grievances to their employer in person or through representatives of their own choosing, and the employer shall confer with them in relation thereto.

(2) Whenever a question arises concerning the determination of a collective bargaining unit as defined in section 111.02 (6), it shall be determined by secret ballot, and the board, upon request, shall cause the ballot to be taken in such manner as to show separately the wishes of the employes in any craft, division, department or plant as to the determination of the collective bargaining unit.

(3) Whenever a question arises concerning the representation of employes in a collective bargaining unit the

board shall determine the representatives thereof by taking a secret ballot of employes and certifying in writing the results thereof to the interested parties and to their employer or employers. There shall be included on any ballot for the election of representatives the names of all persons submitted by an employe or group of employes participating in the election, except that the board may, in its discretion, exclude from the ballot one who, at the time of the election, stands deprived of his rights under this chapter by reason of a prior adjudication of his having engaged in an unfair labor practice. The ballot shall be so prepared as to permit of a vote against representation by anyone named on the ballot. The board's certification of the results of any election shall be conclusive as to the findings included therein unless reviewed in the same manner as provided by subsection (8) of section 111.07 for review of orders of the board.

(3m) Whenever an election has been conducted pursuant to subsection (3) in which the name of more than one proposed representative appears on the ballot and results in no conclusion, the board may, in its discretion, if requested by any party to the proceeding within 30 days from the date of the certification of the results of such election, conduct a run-off election. In such run-off election, the board may drop from the ballot the name of the representative that received the least number of votes at the original election, or the privilege of voting against any representative when the least number of votes cast at the first election was against representation by any named representative.

(4) Questions concerning the determination of collective bargaining units or representation of employes may be raised by petition of any employe or his employer (or the representative of either of them). Where it appears by the petition that any emergency exists requiring prompt action, the board shall act upon said petition forthwith and hold the election requested within such time as will meet the requirements of the emergency presented. The fact that one election has been held shall not prevent the holding of another election among the same group of employes, provided that it appears to the board that sufficient reason therefor exists.

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In the

Supreme Court of the United States

October Term, 1948.

No. 38

LA CROSSE TELEPHONE CORPORATION,
Appellant,

v.

WISCONSIN EMPLOYMENT RELATIONS BOARD, ET AL.

No. 39

INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, LOCAL B-953, A. F. of L.,
Appellant,

v.

WISCONSIN EMPLOYMENT RELATIONS BOARD, ET AL.

BRIEF AND APPENDIX OF COMMUNICATION WORKERS OF AMERICA, DIVISION 23

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BRIEF AND APPENDIX OF COMMUNICATION WORKERS OF AMERICA, DIVISION 23

OPINIONS BELOW

The opinion of the Wisconsin Supreme Court from which appeal is taken is reported in 251 Wis. 583, 30 N. W. 2d 241.

STATEMENT RESPECTING JURISDICTION

The appellants seek to invoke the jurisdiction of this court under sec. 237 (a) of the Judicial Code, 28 U. S. C. A. sec. 344.

On April 19, 1948 this court took the following action:

> "The statements of jurisdiction in these cases having been submitted and considered by the court, further consideration of the question of jurisdiction of this court is postponed to the hearing of the cases on the merits."

The Communication Workers of America, Division 23, is a real party in interest in this case since it was the petitioner in the action before the Wisconsin Employment Relations Board, and participated actively in the proceedings before both state courts. It was not served with any notices of the appeals to this court. During October of 1948 it was served with copies of briefs in connection with the appeals, but before proceeding further it was necessary for counsel to determine Division 23's desires and to obtain its approval. The Communication Workers of America, Division 23, does desire a decision in this case. The Communication Workers of America, Division 23, believes it is a necessary party appellee, but is willing to waive any claim which might be based upon failure to receive proper notice of appeal, in order that the issues before this court may be determined.

The Communication Workers of America, Division 23, formerly operated under the name Telephone Guild of Wisconsin; and it is so referred to throughout the record.

QUESTIONS PRESENTED

This appellee supports the position taken by the Wisconsin Employment Relations Board in that it believes this court should affirm the judgment below, but it does not wish to oppose this court's taking jurisdiction to pass upon the merits. The primary issue, in the opinion of this appellee, is the second one presented in the brief of the State Board:

Did Congress, by the mere enactment of the National Labor Relations Act, preclude a state agency from conducting an election to ascertain the wishes of employees of a local telephone company with respect to a bargaining representative, when no enforcible order or judgment is entered on the basis of such election; and when the National Labor Relations Board has never taken jurisdiction of any phase of the labor relations between the employer and employees involved?

STATEMENT OF THE CASE

On September 20, 1946, a petition for an election among employees of the La Crosse Telephone Corporation was filed with the National Labor Relations Board (Case No. 18-R-1864) by the Guild. (The Communication Workers of America, Division 23, which formerly operated under the name of Telephone Guild of Wisconsin, is herein referred to as the Guild to avoid confusion.) The National Board's examiner was unable to obtain informal determination of the question of representation because of the employer's refusal to consent to an election, and so such examiner advised the Guild to withdraw its petition and to file one with the State Board for the reason that the case load of the National Board was so heavy that it would require at least seven months to process the matter. The National Board's examiner called the chairman of the Wisconsin Employment Relations Board and asked if that board would accept a petition.*

On October 8, 1946, the Guild withdrew its petition filed with the National Board, pursuant to such advice, and a new petition was filed with the State Board. The petition requested the State Board to conduct an election among employees of the La Crosse Telephone Corporation as to their collective bargaining representative. The State Board conducted an election on December 17, 1946, in which employees in the bargaining unit formerly represented by

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*Such information is indicated in the brief of the United States as **amicus curiae** (pages 4 and 5) to be judicially noticeable. We are somewhat doubtful whether, under the rule of **Great Northern Ry. Co. v. Sunike**, 261 U. S. 149, the informal dealings described in such brief may be judicially noticed; but if the rules of judicial notice cover the transactions described at pages 4 and 5 of the brief **amicus curiae**, they undoubtedly cover the comparable transactions relating to withdrawal of the petition above described. We are, however, giving the same details by affidavits at pages 9-12, 19 of the appendix to this brief.

the appellant, International Brotherhood of Electrical Workers, A. F. of L., Local Union No. B-953, expressed their wish to have the Guild as their bargaining representative by the following vote: (R. 12-14)

FOR THE GUILD — 91
FOR LOCAL B-953 — 14

It was the State Board's certification of such vote from which the employer and Local B-953 appealed.*

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*The brief **amicus curiae** contains at page 8 some statements relative to events which took place after the action of the State Board which is under review and which we assume can have no bearing, since it would seem that the validity of action under review would have to be determined on the basis of the facts in the record upon which it was taken. If the later events are deemed by this court to be pertinent, however, we believe that inaccuracies, which may have resulted from incomplete data, should be corrected. The Guild did file two later petitions with the National Board, but both were withdrawn by the Guild with permission of the Board's Regional Director, without prejudice, rather than dismissed upon the merits as stated in the brief **amicus curiae.** We are covering details by affidavits reproduced in our appendix, although the facts described are in records of the National Board and would be judicially noticeable if the position taken at pages 4, 5, and 8 of the brief of the United States **amicus curiae** is correct.

The circumstances surrounding the filing and withdrawal of the later petitions are as follows:

After the Circuit Court for La Crosse County issued its decision, indicating the State Board's jurisdiction to conduct an election had been negated by the **Bethlehem Steel** decision, the Guild filed a petition for election by the National Board. (Case 18-R-1882) The field examiner to whom the petition was assigned wrote the Guild, recommending that the petition be withdrawn and another filed about two months later when the expiration date of the contract negotiated between the employer and Local B-953 the previous autumn would be near, so that there "would be no question of the timeliness of such a petition" and "the Regional Director and the Regional Attorney would both consider the majority vote in the State conducted election in December 1946 as evidence of representation." (Appendix 20-21) The Guild petitioned the National Board to review the Regional Director's declination to proceed with further investigation at that time, but before the review could be processed sufficient time had elapsed so that the question was no longer pertinent. The Guild was, therefore, permitted by the Regional Director to withdraw the earlier petition "without prejudice" (See withdrawal request and letter of permission at pages 21-22 of the appendix) and a new petition was filed simultaneously. The processing of the new petition had to be delayed because of the Taft-Hartley Act's becoming effective and the necessity of filing affidavits and reports required by that act. By the time that had been done, the Wisconsin Supreme Court had reversed the judgment of the lower court, and there seemed to be no necessity for further election. Accordingly, the Guild withdrew its last petition by permission of the Regional Director "without prejudice." (See letter of permission at pages 14-15 of appendix)

ARGUMENT

This appellee endorses the argument of the Wisconsin Employment Relations Board but wishes also to suggest that the interests of this appellee, as the representative chosen by 91 out of 105 of the employees who voted, inject into the case something more than the impersonal issues of the jurisdiction discussed by the State Board. Both federal and state legislation purport to seek avoidance of industrial conflict by providing to employees other means of effectuating their right to bargain through their chosen representatives. The Guild and the employees of the La Crosse Telephone Corporation have for two years refrained from methods of enforcing their desires which the federal and state laws seek to avoid, and have instead resorted in good faith to the processes of justice which the laws seek to substitute. In resorting to such processes of justice, the Guild has not sought to "shop around" between governmental agencies, but resorted first to the National Labor Relations Board. It removed its petition from that board to the State Board only upon the advice of the examiner in charge of the National Board's Milwaukee office that it would be better to do so, because the case load of the National Board was so great that it could not process a petition opposed by an employer in less than seven months.

It is in cases where the employer opposes the obtaining of impartial evidence respecting the desires of employees that assistance is most greatly needed; because if an employer is willing to have the fact ascertained, it can be done easily and readily even without the assistance of either the National or State Board.

If the appellants' challenge of the State Board's jurisdiction is grounded, as they say, upon assertion of exclusive jurisdiction in the National Board, they could have procured a determination by the latter by agreement when its examiner conferred with them upon receipt of the first petition, or either of the appellants could have filed a petition with the National Board at any time. Instead, they sought, and still seek, to avoid an election by either board.

Having ascertained upon the filing of the Guild's first petition that the employer sought to evade an election, the representative of the National Board not only advised the Guild to transfer its petition to the State Board, but in the presence of the Guild's counsel and one of its officers telephoned the chairman of the State Board to ask if the latter would take jurisdiction. During the entire proceedings before the State Board, there was no indication of a change in attitude on the part of the National Board.

The two petitions which were filed with the National Board by the Guild subsequent to the election by the State Board, and then withdrawn, were the result of an attempt to keep apace with developments in the review proceedings carried on by the employer and Local B-953. The withdrawals of such petitions resulted from an endeavor to avoid complications in the determinations of issues involved in such review. The Guild has, throughout the proceedings, sought squarely and directly to have such issues determined authoritatively and conclusively. The National Board, in connection with such subsequent petitions, has never proceeded to the stage of making a jurisdictional finding nor of making a final decision upon the merits of the petition. The final action taken by such board with

respect to the petitions in both cases was to approve the withdrawal of the petitions without prejudice.

For two years the Guild has patiently awaited the outcome of its resort to the processes of justice instead of resorting to a strike or similar forms of economic pressure. If, at the end, it were to find itself frustrated by technicalities, we believe that the intent and objectives of both the legislature of Wisconsin and the Congress of the United States would be defeated rather than served.

Respectfully submitted,

DONALD J. MARTIN,
Counsel for Communication Workers of America, Division 23.

CHARLES KOONS,
Washington, D. C.
Of Counsel

APPENDIX

AFFIDAVIT

STATE OF WISCONSIN }
MILWAUKEE COUNTY } ss.

Edward J. Brophy having been first duly sworn on oath, says that he is a resident of the City of Milwaukee, Milwaukee County, Wisconsin, residing at 741 North 12th Street in said city, county, and state. That on the 20th day of September 1946, and thereafter at all times material hereto he was an employee of the National Labor Relations Board acting as the Examiner in Charge of the office maintained by the National Labor Relations Board at the City of Milwaukee, Wisconsin. That on said 20th day of September, 1946, he received a petition filed by the Telephone Guild of Wisconsin with such board, which petition requested the board to ascertain and certify the collective bargaining representative of certain employees of the La Crosse Telephone Company. That he made an investigation and had an informal conference with the representatives of the petitioning guild, the employer, and the International Brotherhood of Electrical Workers, which union was then representing the employees involved. That at such informal conference both the employer and the International Brotherhood of Electrical Workers indicated that they would not consent to the conduct of an election by the National Board, and that it would be necessary for a hearing to be conducted, and an order by the Board directing such election before one could be held. That affiant thereupon contacted the chairman of the Wisconsin Employment Relations Board and inquired as to whether that Board would entertain a similar petition from the Telephone

Guild if the Guild withdrew its petition from the National Board, and was advised that the Wisconsin Board would entertain such a petition, and after a hearing make a determination as to whether it would conduct an election or not. That because of the excessive case load then pending before the regional office of the National Labor Relations Board affiant was of the opinion that a long period of time would elapse before a hearing could be had and the petition of the Guild disposed of. That affiant thereupon advised the representatives of the Guild that speedier action might be obtained by proceeding before the Wisconsin Employment Relations Board. That he had contacted that board and that the Wisconsin Board would entertain such a petition provided the pending petition with the National Board was withdrawn and a new petition filed with the Wisconsin Board. That thereupon, the Guild requested the withdrawal of its petition then pending before the National Board and such withdrawal was approved by the Regional Director of such board. That affiant is informed and believes that immediately thereafter the Guild filed a new petition with the Wisconsin Board, and that at the time such petition was filed there was no matter involving the employees of the La Crosse Telephone Company pending before the National Board.

EDWARD J. BROPHY

Signed and suscribed
before me this 12th day of November, 1948.
CARL L. GLAZEWSKI
Notary Public
Milwaukee County, Wisconsin
My Commission Expires May 27, 1951

AFFIDAVIT

STATE OF WISCONSIN }
MILWAUKEE COUNTY } ss.

Ray F. Dryer, being first duly sworn on oath, deposes and says that he is a resident of the City of Milwaukee, Milwaukee County, Wisconsin, residing at 759 North Milwaukee Street in said city, county and state; that on the 20th day of September, 1946, and thereafter at all times material hereto, he was executive secretary of the Telephone Guild of Wisconsin; that on September 20, 1946 the Telephone Guild of Wisconsin filed a petition with the National Labor Relations Board asking to represent certain employees of the La Crosse Telephone Corporation (Case No. 18-R-1864); that Edward J. Brophy, examiner in charge of the National Labor Relation Board's Milwaukee office, informed the affiant that it would take at least seven months for the National Board to complete investigation on the petition because of its heavy case load; that said Edward J. Brophy advised affiant to withdraw the petition and file one with the Wisconsin Employment Relations Board where the matter could be handled sooner; that said Edward J. Brophy telephoned to the chairman of the Wisconsin Employment Relations Board in the affiant's presence to ask whether the State Board could handle the matter; that pursuant to such advice the Telephone Guild of Wisconsin withdrew said petition from the National Labor Relations Board; and that on October 9, 1946 said withdrawal was approved by the regional director of

the Minneapolis office of the National Labor Relations Board.

RAY F. DRYER

Signed and subscribed before me
this 12th day of November, 1948.
CARL L. GLAZEWSKI
Notary Public, Milwaukee County, Wisconsin
My Commission expires May 27, 1951.

AFFIDAVIT

STATE OF WISCONSIN }
MILWAUKEE COUNTY } ss.

Arthur B. LeFevre being first duly sworn on oath says that he is a resident of the City of Milwaukee, Milwaukee County, Wisconsin, residing at 759 North Milwaukee Street in said city, county and state; that on December 17, 1946 and at all times thereafter up to the present date, he was president of the Telephone Guild of Wisconsin, the former name of Division 23, Communication Workers of America, and that therefore he has continuously been president of the union referred to herein as the Guild for such entire period of time; that on December 17, 1946 an election was conducted by the Wisconsin Employment Relations Board among the employees of the La Crosse Telephone Corporation in which they overwhelmingly expressed themselves in favor of the Guild as their collective bargaining agent; that on May 5, 1947, subsequent to the Circuit Court of La Crosse County deciding that in accordance with the Bethlehem Steel case the State Board had no jurisdiction, the Guild did file a new petition for certification of representa-

tives with the National Board, Case No. 18-R-1882; that said petition was withdrawn by the Guild on August 1, 1947 simultaneously with the filing of a new petition (Case No. 18-R-1946) requesting a determination of representatives for the same employees; that the National Labor Relations Board assigned the new petition to Field Examiner Bruce of the Minneapolis office of the National Board; that due to a request from the National Board of September 30, 1947 (Case No. 13M-R-23) requesting the Guild to meet the new requirements of section 9 (f) (g) and (h) of the Labor Management Relations Act, the National Board deferred further action on the petition until such requirements had been met; that on December 30, 1947 Examiner Bruce requested that new and current evidence of representation be submitted by the Guild; that prior to the Guild's obtaining this new and current evidence, the Wisconsin Supreme Court at 251 Wis. 586-589, 30 N. W. 2d 242-243 reversed the decision of the Circuit Court for La Crosse County and upheld the decision of the Wisconsin Employment Relations Board; that because of the decision of the Wisconsin Supreme Court, the Guild deemed it unnecessary to obtain new evidence but withdrew its petition under Case No. 18-R-1946 on February 5, 1948, which withdrawal was approved by the regional director on February 11, 1948 without prejudice; and that there is attached hereto, marked Exhibit 1, a true and correct copy of the letter received from the National Labor Relations Board approving such withdrawal.

That affiant is informed and believes that during these entire proceedings covering the review by the Circuit Court of La Crosse County and the appeal to the Wisconsin Su-

preme Court along with the appeal to the United States Supreme Court as well, the La Crosse Telephone Corporation has continued to negotiate with Local B-953, International Brotherhood of Electrical Workers for the telephone employees.

ARTHUR B. LE FEVRE

Signed and subscribed before me
this 12th day of November, 1948.
CARL L. GLAZEWSKI
Notary Public, Milwaukee County, Wisconsin
My commission expires May 27, 1951.

EXHIBIT 1

NATIONAL LABOR RELATIONS BOARD
Eighteenth Region
801 Wesley Temple Building
Minneapolis 4, Minnesota

February 11, 1948

Mr. Arthur B. Le Fevre, General President
Communications Workers of America,
Division 23
729 North Milwaukee Street
Milwaukee, WISCONSIN

Re: LaCROSSE TELEPHONE CORPORATION
Case No. 18-R-1946

Dear Mr. Le Fevre:

This will acknowledge receipt of your request to withdraw the petition in the above matter without prejudice.

Your request is granted and the company is being notified of the withdrawal.

Very truly yours,

/s/ Charles M. Ryan
CHARLES M. RYAN
Regional Director

M. L.

Cc: Donald J. Martin, Attorney
4608 W. Crawford Avenue
Milwaukee 14, WISCONSIN

Ray F. Dryer, Secretary-Treasurer
Communications Workers of America,
Division 23
729 North Milwaukee Street
Milwaukee, WISCONSIN

AFFIDAVIT

STATE OF WISCONSIN }
MILWAUKEE COUNTY } ss.

Donald J. Martin having been first duly sworn on oath says that he is a resident of the City of Milwaukee, Milwaukee County, Wisconsin, residing at 4608 West Crawford Avenue in said city, county and state; that from September 1, 1946 to and including the present time he has been counsel for the Communication Workers of America, Division 23, formerly known as the Telephone Guild of Wisconsin; that on September 20, 1946 he as attorney for the Telephone Guild of Wisconsin filed a petition (Case No. 18-R-1864) with the National Labor Relations Board to determine the question of representation for employees of the La Crosse Telephone Corporation; that he attended a meet-

ing on September 30, 1946, at La Crosse, Wisconsin, conducted by Edward J. Brophy, examiner in charge of the Milwaukee sub-regional office of the National Labor Relations Board and that it was impossible to determine informally the question of representation involved in the case because of the employer's refusal to consent to an election; that on October 8, 1946 the Guild withdrew its petition (Case No. 18-R-1864) from the National Labor Relations Board upon advice of Examiner Brophy, who stated that much quicker action could be obtained from the Wisconsin Employment Relations Board since the National Board's heavy case load would require at least seven months for hearing and determination of the petition, he having by telephone discussed the matter with the chairman of the Wisconsin Employment Relations Board in the presence of affiant and Ray F. Dryer, executive secretary of the Guild; that this request for withdrawal was approved by the Minneapolis regional office of the National Board on October 9, 1946 in a letter addressed to affiant, true and correct copy of which is hereto attached, marked Exhibit 2; that on October 8, 1946 a petition was filed with the Wisconsin Employment Relations Board and that on October 18, 1946 the Wisconsin Board conducted a hearing on such petition in which affiant acted as counsel for the Guild; that subsequent to this hearing a direction was issued by the Wisconsin Board on November 27, 1946 for an election among the La Crosse Telephone Company employees on December 18, 1946; that subsequent to such election and on January 14, 1947 certification was issued by the State Board in accordance with the results of the election; that review of the certification of the Wisconsin Board was requested by both the company and Local B-953, Interna-

tional Brotherhood of Electrical Workers, A. F. of L., and hearing on such review was held March 27, 1947 in the Circuit Court for La Crosse County in which affiant participated as counsel for the Guild; that subsequent to such hearing and before a decision was handed down by the Circuit Court judge, a decision was made in *Bethlehem Steel Co. v. New York State Labor Rel. Bd.*, (1947) 330 U. S. 767, 67 S. Ct. 1026, 91 L. ed. 1234 and that the Circuit Court for La Crosse County reversed the Wisconsin Board relying on that decision; that subsequent to this decision and in order to expedite the question of representation among telephone company employees though knowing full well the decision of the Circuit Court for La Crosse County would be appealed and on advice of this affiant, the Guild did on May 5, 1947 file a petition with the National Labor Relations Board, Case No. 18-R-1882; that affiant did attend a conference held by Examiner Bruce at La Crosse on June 6, 1947 at which conference it was impossible to arrange an informal determination of the question of representation because of the employer's refusal to consent to an election; that on June 12 the affiant received a letter from Field Examiner Bruce respecting such petition, copy of which is hereto attached and marked Exhibit 3; that on August 1, 1947 and at the request of James M. Shields, regional director at Minneapolis for the National Labor Relations Board, counsel for the Guild requested withdrawal of the petition under Case No. 18-R-1882 and filed a new petition covering the same company and the same employees with the National Labor Relations Board, true and correct copies of the request for permission to withdraw said petition, and of the letter approving same are attached hereto, marked Exhibit 4 and 5 respectively.

That due to the formal filing requirements of Public Law #101, the Taft-Hartley Act, no action was taken under Case No. 18-R-1946 until December 30, 1947 at which time Examiner Bruce, to whom the case had been assigned requested new evidence of representation in the form of current membership or application cards; that before this request could be complied with the Wisconsin Supreme Court at 251 Wis. 586-589, 30 N. W. 2d 242-243 reversed the decision of the Circuit Court for La Crosse County and sustained the findings of the Wisconsin Employment Relations Board; that subsequent to this decision and on February 5, 1948 the Guild requested withdrawal of its petition under Case No. 18-R-1946 which request was granted by the Minneapolis regional director, Charles M. Ryan, on February 11, 1948 without prejudice; that during the entire period referred to herein counsel for the Guild has attempted to have the parties await a final determination of the question of representation until a determination could be made by a court of last resort.

DONALD J. MARTIN.

Signed and subscribed before
me this 12th day of November, 1948.
CARL L. GLAZEWSKI,
Notary Public, Milwaukee County, Wisconsin
My Commission expires May 27, 1951.

EXHIBIT 2

NATIONAL LABOR RELATIONS BOARD
Eighteenth Region
801 Wesley Temple Building
Minneapolis 4, Minnesota

October 9, 1946

Mr. Donald J. Martin
Telephone Guild of Wisconsin
4608 West Crawford Avenue
Milwaukee, WISCONSIN

Re: LaCROSSE TELEPHONE COMPANY
Case No. 18-R-1684

Dear Mr. Martin:

This will acknowledge receipt of your request to withdraw the petition in the above matter without prejudice.

Your request is granted and the company is being notified of the withdrawal.

Very truly yours,

/s/ Aubrey McEachern
AUBREY McEACHERN
Acting Regional Director

Cc: Wisconsin Telephone Guild
759 North Milwaukee Street, Room 521
Milwaukee, WISCONSIN

jmc

EXHIBIT 3

NATIONAL LABOR RELATIONS BOARD
Eighteenth Region
801 Wesley Temple Building
Minneapolis 4, Minnesota

June 12, 1947

Mr. Donald J. Martin
4608 W. Crawford Avenue
Milwaukee 14, Wisconsin

Re: LA CROSSE TELEPHONE CORPORATION
Case No. 18-R-1882

Dear Mr. Martin:

The evidence in this case has been considered, and in view of the legal question as to the timeliness of the present petition, which petition involves the history of the various cases in the past year, it is my recommendation that the present petition be withdrawn. A new petition could then be filed about the middle of August, and we could then proceed with a relatively simple representation case. There would be no question as to the timeliness of such a petition, and I am advised that the Regional Director and the Regional Attorney would both consider the majority vote in the State conducted election in December 1946 as evidence of representation, though, of course, new membership cards would be more convincing evidence.

Thus, if we were to proceed now, the outcome with respect to a Board order is doubtful, but I am of the belief that an election would be ordered if the petition were filed at a more appropriate date. I am, therefore, enclosing a Withdrawal Request form for you or Mr. Dryer to sign and return to this office. Under separate cover I am return-

ing your membership application forms as well as your copy of the State Hearing Trancript and the State Certification.

Very truly yours,

/s/ Alan Bruce
Alan Bruce
Field Examiner

Enclosure

EXHIBIT 4

WITHDRAWAL REQUEST

In the matter of La Crosse Telephone Corporation
(Name of case)

18-R-1882
(Number of case)

This is to request withdrawal of the (petition) ~~(charge)~~ in the above case without prejudice.

Communications Workers of America, Division 23 (Successor to Telephone Guild of Wisconsin) affiliated with National Federation of Telephone Workers
(Name of Union or Employer)

By /s/ Ray F. Dryer
RAY DRYER (Name of Representative)

Secy-Treasurer (Title)

Date August 1, 1947

Withdrawal request approved

(Date)

(Regional Director)

EXHIBIT 5

NATIONAL LABOR RELATIONS BOARD
Eighteenth Region
801 Wesley Temple Building
Minneapolis 4, Minnesota

August 4, 1947

Mr. Donald J. Martin,
Attorney for Communications Workers of America,
Division 23,
4608 W. Crawford Avenue,
Milwaukee 14, Wisconsin.

Re: LaCrosse Telephone Corporation
Cases Nos. 18-R-1882
18-R-1946

Dear Mr. Martin:

This acknowledges receipt of your request to withdraw petition in the above matter, which request is hereby granted and the case is being closed.

Receipt is, also, acknowledged of your new petition in Case No. 18-R-1946. This matter is being assigned to Field Examiner Alan Bruce.

Your letter does not indicate that a new claim of representation has been made by you upon the employer in connection with the filing of the new case. If this has not yet been done I deem it important that you make such a claim immediately. In any event, please submit a copy of the letter sent by you to the employer requesting recognition, which will then enable us to proceed without reference to the former case.

Very truly yours,

/s/ James M. Shields
James M. Shields
Regional Director